14-618

# In the Supreme Court of the United States

JEFFREY WOODS, PETITIONER

v.

CORY DONALD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether the Michigan courts' decision not to extend *Cronic* to cover counsel's brief absence from trial was an "extreme malfunction" entitling the petitioner to habeas relief.

2. Whether the Michigan courts reasonably determined that Donald had not shown *Strickland* prejudice flowing from his counsel's brief absence in a multi-defendant case during the taking of evidence that did not inculpate his client.

## PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Jeffrey Woods, warden of a Michigan correctional facility. The respondent is Cory Donald, an inmate. In the proceedings below, the habeas respondent was Lloyd Rapelje. Woods is Donald's current warden.

## TABLE OF CONTENTS

Questions Presented ..... i

Parties to the Proceeding ..... ii

Table of Contents ..... iii

Table of Authorities ..... v

Opinions Below ..... 1

Jurisdiction ..... 1

Constitutional and Statutory Provisions Involved .... 1

Introduction ..... 3

Statement of the Case ..... 5

A. Donald and several others conspire to rob Mohammed Makki, who is shot and killed. ..... 5

B. The jury hears evidence that does not inculpate Donald for ten minutes in the absence of Donald's counsel. ..... 7

C. Donald is convicted and unsuccessfully seeks relief in Michigan's appellate courts. ..... 8

D. The district court grants habeas relief, and a divided Sixth Circuit panel affirms. 10

Reasons for Granting the Petition ..... 11

I. No clearly established federal law requires a state court to apply *Cronic*, rather than *Strickland*, to a claim concerning defense counsel's brief absence from the courtroom in a multi-defendant trial. ..... 11

A. The majority below erred in holding that the state court unreasonably applied clearly established federal law. ..... 11

B. The state court's decision was not contrary to any clearly established federal law. ..... 17

II. The state court reasonably concluded that Donald had failed to show prejudice flowing from his counsel's brief absence ..... 19

Conclusion ..... 22

## APPENDIX TABLE OF CONTENTS

United States Court of Appeals
for the Sixth Circuit, Opinion in No. 12-2624
issued August 26, 2014 ..... 1a–25a

United States District Court – E.D. of Mich.
Memorandum and Order
Conditionally Granting Petition for a
Writ of Habeas Corpus in No. 09-cv-11751
issued December 5, 2012 ..... 26a–57a

Michigan Supreme Court
in No. 136575
issued October 1, 2008 ..... 58a–58a

Michigan Court of Appeals
in No. 275688 and No. 275691
issued April 10, 2008 ..... 59a–74a

Transcript Excerpt (Pages 63 to 83)
Wayne County Circuit Court
Case Nos. 05-12835, 06-3169, 06-3170
People of Michigan vs. Rashad Moore, Dewayne Saine and Cory Donald,
Jury Trial, September 21, 2006 ..... 75a–98a

## TABLE OF AUTHORITIES

**Cases**

*Bell* v. *Cone*,
535 U.S. 685 (2002) ..... 19

*Berryman* v. *Wong*,
2010 WL 289181 (E.D. Cal. 2010)..... 15

*Green* v. *Arn*,
809 F.2d 1257 (6th Cir. 1987) ..... 16

*Harrington* v. *Richter*,
562 U.S. 86 (2011) ..... 10

*Javor* v. *United States*,
724 F.2d 831 (9th Cir. 1984) ..... 15

*Muniz* v. *Smith*,
647 F.3d 619 (6th Cir. 2011) ..... 11, 15

*Scherzer* v. *Ortiz*,
111 F. App'x 78 (3d Cir. 2004) ..... 14

*Strickland* v. *Washington*,
466 U.S. 668 (1984) ..... passim

*Sweeney* v. *United States*,
766 F.3d 857 (8th Cir. 2014) ..... 15

*Tippins* v. *Walker*,
77 F.3d 682 (2d Cir. 1996)..... 15

*United States* v. *Cronic*,
466 U.S. 648 (1984) ..... passim

*United States* v. *Evans*,
62 F. App'x 229 (10th Cir. 2003)..... 15

*United States* v. *Russell*,
205 F.3d 768 (2000) ..... 13, 16

*United States* v. *Sweeney*,
2013 WL 1346123 (D. Minn. April 3, 2013)..... 13

*Van* v. *Jones*,
475 F.3d 292 (6th Cir. 2007) ..... 13

*Vines* v. *United States*,
28 F.3d 1123 (11th Cir. 1994) ..... 13, 14

*White* v. *Woodall*,
134 S. Ct. 1697 (2014) ..... 3, 12, 17

*Williams* v. *Taylor*,
529 U.S. 362 (2000) ..... 12, 18

**Statutes**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2241 *et seq*..... 1, 11, 17, 19

28 U.S.C. § 2254(d) ..... 11

28 U.S.C. § 2254(d)(1)..... 11

28 U.S.C. § 2254(d)(2)..... 11

Mich. Comp. Laws § 750.316(b) ..... 7

Mich. Comp. Laws § 750.529..... 7

**Constitutional Provisions**

U.S. Const. amend VI ..... 1

## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App. 1a–25a, is reported sub nom. *Donald* v. *Rapelje*, at — F App'x — (6th Cir. 2014), and is available at 2014 WL 4211202. The opinion of the district court granting habeas relief, App. 26a–57a, is not reported, but is available at 2012 WL 6047130. The order of the Michigan Supreme Court denying leave to appeal, App. 58a, is reported at 756 N.W.2d 87 (Mich. 2008). The opinion of the Michigan Court of Appeals affirming Donald's convictions, App. 59a–74a, is not reported, but is available at 2008 WL 1061551.

## JURISDICTION

The Sixth Circuit's opinion was entered on August 26, 2014. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

## INTRODUCTION

This Court has never held that the taking of evidence relating only to *other* defendants in a multiple-defendant trial constitutes a critical stage of a defendant's trial. But here, the Sixth Circuit treated a ten-minute absence by Cory Donald's counsel during the taking of evidence that linked other defendants to each other as a violation of *United States* v. *Cronic*, 466 U.S. 648 (1984). Because the Sixth Circuit had to extend the rationale of *Cronic* before it could apply it to the facts of this case, "by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White* v. *Woodall*, 134 S. Ct. 1697, 1706 (2014).

Thirty years ago, this Court held that a criminal defendant seeking to show that his counsel was ineffective was generally required to show that the deficiency had some effect on the reliability of the trial, except under certain extraordinary circumstances. *Cronic*, 466 U.S. at 658–59. Among those circumstances is the complete denial of counsel at a critical stage of his trial. This Court did not, at that time or at any time since, provide a comprehensive definition of what constitutes a "critical stage," although it has, in subsequent cases, answered the question as to particular proceedings.

Here, the Sixth Circuit decided to do what this Court has not done—extend *Cronic* to a situation where counsel is briefly absent during a multi-defendant trial. Donald was one of three defendants jointly tried for the robbery and murder of Mohammed Makki. During trial, the prosecution sought to admit evidence that connected the other

two defendants to each other and to two other co-conspirators. None of it inculpated Donald, and in fact Donald never contested that the other four men were working together in a conspiracy to rob Makki, or that they did in fact rob and kill Makki.

For a mere ten minutes of this testimony—testimony that never once mentioned Donald—Donald's counsel was absent from the courtroom. After Donald's counsel returned, the trial court told him what testimony he had missed, and he told the court, in front of the jury, that he "had no dog in the race and no interest in that."

The Michigan Court of Appeals held that this scenario does not fall under *Cronic*'s presumption of prejudice, and that Donald was not entitled to relief because he could not demonstrate prejudice. The Michigan court cited an Eleventh Circuit case with similar facts, and the Michigan court's holding was consistent with the holdings of several other courts of appeals, including the Sixth Circuit. Then, applying *Strickland* v. *Washington*, 466 U.S. 668 (1984), the court found that Donald suffered no prejudice.

Although the Sixth Circuit was unable to identify a decision of this Court holding that any brief portion of evidence-taking at trial is per se a "critical stage" triggering a presumption of prejudice—let alone one holding that evidence-taking concerning other defendants at a multi-defendant trial is—it nonetheless held that the Michigan Court of Appeals' decision was an unreasonable application of *Cronic*, and that Donald was entitled to habeas relief.

This Court should grant certiorari and reverse.

## STATEMENT OF THE CASE

### A. Donald and several others conspire to rob Mohammed Makki, who is shot and killed.

One November night Seante Liggins, Rashad Moore, Dewayne Saine, and Cory Donald planned a robbery. Moore drove the other three to a Detroit store to meet with Fawzi Zaya. 9/20/06 Trial Tr. at 142. Moore, Saine, Liggins, and Zaya sat in a van drinking and smoking and discussing "hitting a lick on"—i.e., robbing—Mohammed "Mike" Makki. *Id.* at 144–46. Moore, Saine, and Liggins finished their conversation with Zaya and then went with Donald to a vacant house they frequented. *Id.* at 147–49, 157–58. Moore spoke on his phone a bit, then told the others that it was "about that time." *Id.* at 159, 161. Saine and Donald went behind the vacant house, and when they returned, Donald appeared to be situating a gun on his hip. *Id.* at 161–63. Liggins, Moore, and Donald got into a car—Liggins drove, and Moore directed him to an address in the Detroit suburb of Dearborn. *Id.* at 163–65. All three wore black skull caps and black coats. *Id.* at 165. When they arrived, Donald and Moore went inside, while Liggins waited in the car. *Id.* at 165, 167.

The house belonged to Makki. Michael McGinnis, a friend of Makki, was there at the time. 9/19/06 Trial Tr. at 150. Makki was about to leave for work when a masked man came in with a gun. *Id.* at 154. McGinnis lay face-down on the floor with his hands on his head, but was able to hear and feel what happened. *Id.* at 155–56. First, he heard "like a scuffling, like, two people, kind of like, you know, feet

moving around." *Id.* at 156. Then someone other than Makki said, "[L]et it go, let it go." *Id.* Then, there were two shots. *Id.* at 157.

McGinnis then felt someone rifling through his pockets, saying, "[W]hat you got, what you got." 9/19/06 Trial Tr. at 157. He felt a gun to the back of his head. *Id.* He knew there were two people, because they were talking to each other, and because he could hear one of them going to the basement while he could still feel the other standing over him. *Id.* One of the men whispered to the other, "I got shot, I got shot." *Id.* at 158. The men then left. *Id.*

McGinnis counted to thirty before lifting his head. 9/19/06 Trial Tr. at 158. He then went to the kitchen to find Makki lying on the floor, slumped against the refrigerator, gasping for air. *Id.* Before he died, Makki told McGinnis, "[A]ll this shit don't mean nothing if you're not here to enjoy it." *Id.* at 159. McGinnis then ran to the home next-door, banged on the door, and asked the neighbor to call the police.

In the meantime, Donald and Moore ran back to the car, and Donald told Liggins that Moore had shot him. 9/20/06 Trial Tr. at 168. Liggins saw that both Donald and Moore had handguns. *Id.* at 169. Moore and Donald discussed how much they had stolen—Donald said they got $320, and Moore wanted to go back for more. *Id.* at 170.

The three then met up with Saine. 9/20/06 Trial Tr. at 171–72. Donald got out of the car and into Saine's car. *Id.* at 172–73. Liggins and Moore drove away, and the police arrested them later that night.

*Id.* at 173–75. Donald checked into the hospital that night. 9/21/06 Trial Tr. at 83–85.

### B. The jury hears evidence that does not inculpate Donald for ten minutes in the absence of Donald's counsel.

Donald was charged with one count of first-degree felony murder, Mich. Comp. Laws § 750.316(b) and two counts of armed robbery, § 750.529. Moore and Saine were also charged with felony-murder and various predicate crimes. Liggins and Zaya pleaded guilty to second-degree murder.

Moore, Saine, and Donald were tried together. Two juries were impaneled, Jury 1 for Donald and Saine, and Jury 2 for Moore. On the fourth day of trial, the prosecution sought to admit a chart that compiled telephone records of calls between the cell phones of Moore, Saine, and Zaya. Outside the presence of the juries, Moore and Saine's counsel objected, but Donald's counsel Richard Cunningham declined to object, saying, "I don't have a dog in this race. It doesn't affect me at all." App. 76a–77a. The court ruled that the exhibit was admissible, and then ordered a recess of "about five minutes." App. 77a.

About 23 minutes later, the court went back on the record, and two minutes after that, the juries were brought in. App. 77a–78a. Before resuming testimony, the court said, "Mr. Cunningham stepped away. We'll wait for him. I didn't realize he was not there, so he should be here momentarily." App. 78a. The court then asked the prosecutor if she was going to present the chart that was discussed before the recess, and she said, "Yes, sir." App. 78a. The court

said, "I think that since we already know Mr. Cunningham, it doesn't apply to his client, we'll go ahead and proceed with that and I'll just let him know that that's what we're doing, okay, all right. So if we['re] just talking about that particular matter we have before we had the break, let's go ahead and get it done." App. 78a–79a. The chart was admitted. App. 79a. Ten minutes later, while the witness was being cross-examined, Cunningham walked back into the courtroom. App. 90a.

After cross-examination, and as the prosecutor was beginning redirect, the trial court interjected, "Just for the record here, note Mr. Cunningham is now here, and up until that point we only were discussing the telephone chart that was there, Mr. Cunningham." App. 93a. Cunningham replied, "Yes, your Honor, and as I had indicated on the record, I had no dog in the race and no interest in that." App. 93a. The court added, "I just wanted to have the record reflect that. Okay. Move on." App. 93a.

### C. Donald is convicted and unsuccessfully seeks relief in Michigan's appellate courts.

Jury 1 found Donald guilty of one count of first-degree felony murder and two counts of armed robbery. Donald appealed, claiming he was denied the effective assistance of counsel by his attorney's brief absence from trial. Specifically, he argued that he was completely denied counsel at a critical stage of proceedings, and was therefore entitled to relief without a showing of prejudice under *Cronic*.

The Michigan Court of Appeals rejected the argument and held, in relevant part:

> A critical stage is one that holds "significant consequences for the accused." *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). In this case, defendant Donald's attorney was absent for a brief portion of the trial during which evidence of telephone records was received. None of the telephone calls were linked to defendant Donald, however, and the telephone record evidence did not directly implicate defendant Donald in the charged crimes. Both before and after the evidence was introduced, defendant Donald's attorney remarked that the evidence did not concern defendant Donald. Under these circumstances, we cannot conclude that defense counsel was absent during a critical stage of the trial. See *Vines v United States*, 28 F3d 1123, 1125–1127 (CA 11, 1994) (declining to hold that counsel was absent during a critical stage of trial within the meaning of *Cronic* where no evidence directly inculpating the defendant was presented while that defendant's counsel was absent). Therefore, defendant Donald is not entitled to a presumption of prejudice arising from counsel's absence. [App. 62a–63a.]

The Michigan Court of Appeals went on to address the claim under the general ineffective assistance of counsel standard found in *Strickland*. The court held that Donald failed to establish

prejudice under *Strickland* and was not entitled to relief. App. 63a.

Donald sought leave to appeal to the Michigan Supreme Court, which that Court denied because it was "not persuaded that the question presented should be reviewed by" it. App. 58a.

### D. The district court grants habeas relief, and a divided Sixth Circuit panel affirms.

Donald then filed a petition for habeas relief in the United States District Court for the Eastern District of Michigan. That court held that the Michigan Court of Appeals erred in not applying *Cronic* to Donald's claim, and that this error constituted an "*extreme malfunction*" and therefore "an unreasonable application of clearly established federal law[.]"App. 47a, 51a (quoting *Harrington* v. *Richter*, 562 U.S. 86 (2011)). The district court went on to analyze the claim under *Strickland* and held, in the alternative, that Donald was entitled to relief under that standard as well. Pet App. 51a–56a.

The State appealed, and the Sixth Circuit panel affirmed. The majority held that that the state court's decision was contrary to clearly established federal law regarding what constitutes a "critical stage" for *Cronic* purposes, App. 3a, 12a–17a, and that the Michigan Court of Appeals unreasonably applied *Cronic* in declining to apply it to Donald's claim, App. 3a, 18a–19a. In dissent, Judge Batchelder noted that the Sixth Circuit had earlier determined that there was no clearly established federal law holding that counsel's absence during an

insubstantial portion of trial constituted a deprivation of counsel under *Cronic*. App. 21a–25a, citing *Muniz* v. *Smith*, 647 F.3d 619 (6th Cir. 2011). The Sixth Circuit granted the State's motion to stay the mandate pending its petition for writ of certiorari in this Court.

## REASONS FOR GRANTING THE PETITION

### I. No clearly established federal law requires a state court to apply *Cronic*, rather than *Strickland*, to a claim concerning defense counsel's brief absence from the courtroom in a multi-defendant trial.

The majority below held that the state court's application of *Strickland* to Donald's claim constituted both an unreasonable application of *Cronic* and was contrary to clearly established federal law. Both of these views are erroneous, as there is no clearly established federal law requiring a state court to apply *Cronic* to these facts.

#### A. The majority below erred in holding that the state court unreasonably applied clearly established federal law.

It is uncontested that AEDPA governs Donald's habeas petition, and that the state court adjudicated his claim on the merits, requiring Donald to establish entitlement to relief under the difficult standard of 28 U.S.C. § 2254(d). And Donald has never contended that he is entitled to relief under § 2254(d)(2), which addresses unreasonable factual determinations. For these reasons, the sole question presented is whether Donald has shown, under § 2254(d)(1), that the state court's adjudication of the

claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court.

The majority below held that Donald had shown entitlement to relief under the "unreasonable application" prong. "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision involving an unreasonable application of clearly established federal law." *Williams* v. *Taylor*, 529 U.S. 362, 407–08 (2000) (quotation marks and alterations omitted). But § 2254(d)(1) "does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error." *White*, 134 S. Ct. at 1706.

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. For that reason, this Court has held that, in a typical ineffective-assistance claim, "the burden rests on the accused to demonstrate a constitutional violation." *Id.* But this Court has recognized a small number of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.*

The courts below accepted Donald's argument that his claim fell within the first of these circumstances: "the complete denial of counsel." *Cronic*, 466 U.S. at 659. "[A] trial is unfair if the accused is denied counsel at a critical stage of his

trial." *Id.* The Sixth Circuit identified the pivotal question as "simply whether at the time of the state court decision the holdings of the Supreme Court clearly established that the taking of evidence during trial, where that evidence inculpates the defendant, is a critical stage of the trial." App. 15a.

As the lower federal courts have recognized, this Court has not, since *Cronic*, laid down "a comprehensive and final one-line definition of 'critical stage.' " *Van* v. *Jones*, 475 F.3d 292, 312 (6th Cir. 2007); see also *United States* v. *Russell*, 205 F.3d 768, 771 (2000) ("Since *Cronic* was announced, various Courts of Appeals have struggled to define the 'critical' stages of trial during which the absence of counsel creates a presumption of prejudice.") (collecting cases). As the District of Minnesota has noted, "[a]*ny* approach that *any* court takes will necessarily conflict with numerous judicial decisions." *United States* v. *Sweeney*, 2013 WL 1346123, *4 (D. Minn. April 3, 2013), aff'd 766 F.3d 857 (8th Cir. 2014). Importantly, no decision of this Court has held that a claim of absence of counsel during a brief portion of evidence-taking at trial, particularly during a multi-defendant trial, must be examined under the *Cronic* standard.

The Michigan Court of Appeals cited *Vines* v. *United States*, 28 F.3d 1123 (11th Cir. 1994), in support of its decision not to apply *Cronic* to Donald's claim. In *Vines*, two defendants were tried together for possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute. *Id.* at 1125. For reasons not mentioned in the opinion, Vines' counsel was excused early during

the first day of trial. *Id.* Neither witness who testified during Vines' counsel's absence testified directly as to Vines or his culpability. *Id.* at 1126.

The Eleventh Circuit rejected Vines' argument that, "under *Cronic* the taking of evidence is a critical stage of trial per se." 28 F.3d at 1128 ("we decline to give birth to a rule that the taking of evidence is necessarily a critical stage of trial."). Rather, the court held that, where "no evidence directly inculpating a defendant is presented while that defendant's counsel is absent, we decline to hold that counsel was absent during a critical stage of trial within the meaning of *Cronic*." *Id.*

The Sixth Circuit did not address *Vines*. The district court attempted to distinguish *Vines* by pointing out that Vines consented to his counsel's absence, while Donald did not. In so doing, the district court misstated the Eleventh Circuit's holding. Although Vines did consent to his counsel's absence, 28 F.3d at 1126 n. 3, that fact played no part in the Eleventh Circuit's analysis, and has no relevance to the question whether evidence taking is a per se "critical stage" under *Cronic*.

*Vines* is no outlier, especially in multiple-defendant cases like this one. The Third Circuit has upheld as reasonable the New Jersey Superior Court's decision not to apply *Cronic*'s presumption of prejudice to counsel's temporary absence during evidence-taking. *Scherzer* v. *Ortiz*, 111 F. App'x 78, 84–85 (3d Cir. 2004) (panel including Alito, J.). The Tenth Circuit has followed *Vines* and declined to find *Cronic* error where counsel was briefly absent while codefendant's counsel was cross-examining a

prosecution witness. *United States* v. *Evans*, 62 F. App'x 229 (10th Cir.), cert. den. 540 U.S. 1012 (2003). The Eighth Circuit has declined to apply *Cronic* to a case in which counsel left to go to the bathroom during direct examination of a government witness, and was absent for six pages of trial transcript. *Sweeney* v. *United States*, 766 F.3d 857, 860–62 (8th Cir. 2014). (In comparison, the ten minutes of testimony taken during the absence of Donald's counsel spans only a few more pages—about eleven in total. 9/21/06 Trial Tr. at 69–80.)

Courts have also declined to automatically apply *Cronic* in "sleeping-counsel" cases. "[U]nconscious or sleeping counsel is equivalent to no counsel at all." *Javor* v. *United States*, 724 F.2d 831, 834 (9th Cir. 1984). But courts have only applied a presumption of prejudice when they have found that counsel has slept through a "substantial" portion of trial. *Id.* at 833; *Muniz*, 647 F.3d at 623; *Tippins* v. *Walker*, 77 F.3d 682, 686 (2d Cir. 1996) ("Ordinarily, episodes of inattention or slumber are perfectly amenable to analysis under the *Strickland* prejudice test."); *Berryman* v. *Wong*, 2010 WL 289181, *6–7 (E.D. Cal. 2010) (applying *Strickland* where it appeared counsel only slept briefly during trial).

Even in cases with only a single defendant, courts have not consistently applied *Cronic* to the taking of testimony at trial. In *Muniz*, counsel fell asleep while the prosecutor was cross-examining his client. 647 F.3d at 621. The Michigan court applied *Strickland*, not *Cronic*, to the claim, and the Sixth Circuit denied habeas relief, holding that the Michigan court was not only reasonable, but correct,

in light of Muniz' failure to show that his counsel slept for "a substantial portion of his trial." *Id.* at 623–24.

To be sure, the courts have not been unanimous. In *Russell*, the Fifth Circuit held that, where the defendants were charged with conspiracy, counsel's absence during the taking of evidence inculpating the defendant's co-conspirators was *Cronic* error, because, "[t]o the extent that the government continued to build its case of conspiracy, even if against other co-conspirators, this inferentially increased the taint of guilt of Russell." 205 F.3d at 772. But Donald was not charged with conspiracy. In *Green* v. *Arn*, the Sixth Circuit held that "[t]he absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ without any opportunity for a harmless error inquiry. 809 F.2d 1257, 1263 (6th Cir.), vacated on other grounds 484 U.S. 806 (1987), reinstated 839 F.2d 300 (6th Cir. 1988).

But these opinions demonstrate the very core of the Sixth Circuit's error in this case. Indeed, the opinions demonstrate that the question of where to draw the line is a question on which reasonable jurists can differ—and have differed. As courts engage in honest efforts to determine which standard applies to a particular claim, comity and federalism are disserved when an intermediate federal court tars a state court with a finding of "extreme malfunction" merely because the federal court and the state court reached different reasonable conclusions about a point of law.

In a word, the majority *extended Cronic* to cover the facts in this case, and then faulted the state court for failing to do so. Whether such an extension would have been reasonable—or even correct—in a case on direct review does not alleviate the majority's error in granting habeas relief. Cf. *White*, 134 S. Ct. at 1707 ("Perhaps the next logical step would be to hold [as the Sixth Circuit held]; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all [the State] needs to prevail in this AEDPA case.").

This is not to say that the State condones the trial court's resumption of proceedings without Donald's counsel. The court should have waited before resuming testimony. But the question here is only about whether it was reasonable for the state appellate court to consider whether the trial court's actions denied Donald his right to a fair trial before granting him a new trial.

Because no holding of this Court requires the state courts to treat counsel's ten-minute absence during testimony as *Cronic* error, the Sixth Circuit misapplied AEDPA when it granted habeas relief. This Court should grant certiorari and reverse.

### B. The state court's decision was not contrary to any clearly established federal law.

A decision is "contrary to" clearly established federal law when "the state court applies a rule that contradicts the governing law set forth in" Supreme Court cases, or when "the state court confronts a set

of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a different result " *Williams* v. *Taylor*, 529 U.S. 362, 405–06 (2000).

The Sixth Circuit's lead opinion held that the Michigan Court of Appeals' application of *Strickland* to Donald's claim was contrary to clearly established federal law. But the opinion did not identify any decision of this Court that holds that any portion of trial—however short and whatever happens during it—necessarily constitutes a "critical stage" of the proceedings. Instead, the court's analysis consisted of looking at decisions of this Court establishing that *other* portions of criminal proceedings are critical stages, and then extending the reasoning employed in those decisions to cover the taking of testimony at trial. App. 16a (concluding that taking testimony was "similar to" events that this Court had held to be critical stages and "unlike" events this Court had held were not critical stages).

This misapplication of the "contrary to" clause is precisely the approach this Court disapproved in *Williams*. In an opinion in that case, Justice Stevens, writing for himself and three other justices, advanced the view that the "contrary to" clause could be satisfied by "a finding that the state-court 'decision' is simply 'erroneous' or wrong." 529 U.S. at 389 (opinion of Stevens, J.). This Court rejected that interpretation, in part because it would "ensure[ ] that the 'unreasonable application' clause will have no independent meaning." *Id.* at 407.

Because no comprehensive definition or governing case exists, Judge Moore engaged in an

analysis of *Cronic* and other cases of this Court in order to reach the conclusion that any portion of evidence-taking constitutes a critical stage. Her opinion relied in large part on dicta from this Court's decision in *Bell* v. *Cone*, expressing the view that a "critical stage" is one "that held significant consequences for the accused." 535 U.S. 685, 696 (2002). Like the erroneous unreasonable-application analysis, this was simply extending *Cronic* to these facts, followed by a criticism of the state court for not similarly extending *Cronic*.

But AEDPA does not allow a federal court to extend this Court's holding to a particular set of facts, and then grant habeas relief based on a state court's decision not to do so. The lead opinion is in error, and Donald is not entitled to habeas relief.

## II. The state court reasonably concluded that Donald had failed to show prejudice flowing from his counsel's brief absence.

The Sixth Circuit did not consider, in the alternative, whether Donald was entitled to relief under the *Strickland* standard governing ordinary claims of ineffective assistance of trial counsel. But considering *Strickland*'s prejudice prong confirms why it does not make sense to presume prejudice here.

The Michigan Court of Appeals, reasonably holding that ten minutes of evidence-taking that did not directly inculpate Donald was not a "critical stage" for *Cronic* purposes, chose instead to analyze the claim under *Strickland*'s standard. App. 62a–63a. The court's holding that Donald failed to show

prejudice was reasonable, in light of the fact that Donald's trial theory was completely consistent with the evidence presented during counsel's absence. Counsel embraced the prosecution's theory that there was a conspiracy to rob Makki, that Moore, Liggins, and Saine were part of the conspiracy, and that they carried out the robbery, killing Makki in the process. The only place where Donald and the prosecution parted ways was in Donald's involvement.

The evidence adduced in counsel's absence did nothing to establish Donald's role in the robbery or in Makki's killing. This is why, both before the evidence was adduced and afterwards, counsel told the court that he was unconcerned by it—that he had "no dog in the race." 9/21/06 Trial Tr. at 67, 83.

The district court held that there was prejudice because Donald was being tried on an aiding and abetting theory, and "[t]he phone-call evidence was pivotal in linking all defendants together." App. 54a. But this misreads the evidence—the testimony taken in counsel's absence did nothing to tie Donald to the other defendants or to the crime—it simply tied the other defendants *to each other*. The district court held that Donald's "defense, that he was 'merely present' during the incident, was being challenged." App. 55a. It was not. In fact, the phone call testimony was equally consistent with Donald's theory of defense and with the prosecution's theory. In other words, Donald had a choice for his defense: he could have argued that none of them committed the crime, or he could contend that even if the other defendants did commit the crime, he did nothing to

aid or abet them. It was not unreasonable to take the latter course.

The district court went on to say that "[c]ounsel missed his opportunity to cross examine Detective Marcetti regarding his client's association in the criminal enterprise. Had he been present, counsel could have objected to some of the testimony, and if overruled, could have requested a limited [sic] instruction as to [Donald]." App. 55a. At *best*, this is pure speculation. The district court does not suggest what additional cross-examination counsel might have done, and the record suggests there would have been no cross-examination about the phone call records. As counsel said twice on the record, the testimony did not affect him; he was not interested in it. The district court also does not suggest which question or answer counsel might have objected to had he been present, or what the basis of the objection might have been, whether it might have been meritorious. Nor does the district court indicate what limiting instruction might have been requested and why.

Further, if counsel had objected, he would have directly undermined himself in the eyes of the jury. Counsel said he was not interested in the testimony, but an objection would have signaled the opposite.

In sum, nothing about Donald's trial would have been different if his counsel had been present during that ten minutes of testimony. It is not reasonable to think that his counsel would have raised any objections or cross-examined the witness at all about the phone call testimony. Because he cannot show

prejudice to the outcome of trial, his claim fails under *Strickland*, as the state court reasonably held.

Certiorari is warranted.

## CONCLUSION

The petition for writ of certiorari should be granted and summarily reversed.

Respectfully submitted,

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## APPENDIX TABLE OF CONTENTS

United States Court of Appeals
for the Sixth Circuit, Opinion in No. 12-2624
issued August 26, 2014 ..... 1a–25a

United States District Court
– Eastern District of Michigan
Memorandum and Order
Conditionally Granting Petition for a
Writ of Habeas Corpus in No. 09-cv-11751
issued December 5, 2012 ..... 26a–57a

Michigan Supreme Court
in No. 136575
issued October 1, 2008 ..... 58a–58a

Michigan Court of Appeals
in No. 275688 and No. 275691
issued April 10, 2008 ..... 59a–74a

Transcript Excerpt (Pages 63 to 83)
Wayne County Circuit Court
Case Nos. 05-12835, 06-3169, 06-3170
People of the State of Michigan
vs. Rashad Moore, Dewayne Saine
and Cory Donald,
Jury Trial, September 21, 2006 ..... 75a–98a

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
File Name: 14a0665n.06

No. 12-2624

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

CORY DONALD,
**Petitioner–Appellee,**

v.

LLOYD RAPELJE,
**Respondent–Appellant.**

**FILED**
Aug 26, 2014
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

**OPINION**

**Before: GUY, BATCHELDER, and MOORE, Circuit Judges.**

**KAREN NELSON MOORE, Circuit Judge.** The Sixth Amendment guarantees a criminal defendant the assistance of counsel for his defense. Although generally a defendant must show that his counsel's performance was deficient and prejudicial in order to prevail on a claim of ineffective assistance

of counsel, in *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court held that there are certain situations where the reliability of a trial becomes so unlikely that the defendant need not show that he was actually prejudiced by the absence. Instead, prejudice is presumed. One such situation is the absence of counsel during a critical stage of trial.

During sixteen-year-old Cory Donald's criminal trial, his attorney was absent from the courtroom during the testimony of a government witness. Although the judge noticed that the attorney was absent, he nonetheless proceeded with the trial without informing Donald that he had a right to have an attorney present or asking Donald if he consented to continuing without his attorney. Donald was convicted of one count of felony murder and two counts of armed robbery and was sentenced to life in prison.

On direct appeal, Donald argued that his attorney's absence denied him his Sixth Amendment right to effective assistance of counsel. The Michigan Court of Appeals concluded that the testimony that occurred during Donald's attorney's absence did not implicate Donald in the crime, and so the absence was not during a critical stage and thus the *Cronic* presumption of prejudice did not apply. Donald then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, and the district court granted a conditional writ of habeas corpus. Lloyd Rapelje, Warden of the Michigan state prison, appeals the district court's decision. Because holdings of the Supreme Court dictate that the taking of testimony at trial is a "critical stage," the Michigan Court of

Appeals's failure to apply *Cronic* to the absence of an attorney during the taking of evidence that implicated Donald, and its conclusion that Donald was not denied effective assistance of counsel was contrary to, and an unreasonable application of, clearly established federal law. Accordingly, we **AFFIRM** the district court.

## I. BACKGROUND

### A. Factual Background

On November 14, 2005, Cory Donald ("Donald") and Rashad Moore ("Moore") entered Mohamed Makki's[1] ("Makki") home. While Donald and Moore were inside, Makki was shot and Makki's acquaintance Michael McGinnis ("McGinnis") was robbed. Makki died soon after from the gunshot wounds.

Much of the information about that day comes from the testimony of Seante Liggins ("Liggins").[2] Liggins testified that on the day of the incident, he gathered with Donald, Moore, Dewayne Saine ("Saine"), and Fawzi Zaya ("Zaya") in a Detroit, Michigan, parking lot. R. 8-8 (9/20/06 Trial Tr. at 143) (Page ID #2204). While the men drank alcohol

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[1] The victim's name is spelled differently in the trial documents and briefs. This opinion adopts the spelling "Mohamed Makki" from the district court.

[2] Liggins was charged with felony murder. He entered into a plea agreement where he pleaded guilty to one count of murder in the second degree and agreed to cooperate and testify about the involvement of the other individuals in the death of Mohamed Makki. R. 8-8 (9/20/06 Trial Tr. at 138–39) (Page ID #2219–2220).

and smoked marijuana, Moore and Zaya discussed robbing Makki. *Id.* at 253–54 (Page ID #2207–08). Liggins testified that the gathering moved on to a nearby vacant house where he saw Saine and Donald walk to the back of the house. When Donald returned, he was situating something on his hip that Liggins believed was a gun. *Id.* at 162–63 (Page ID #2223–24). At some point Moore announced to the group that it was time to go "hit the lick," and Liggins, Moore, and Donald got into Liggins's car. *Id.* at 161, 163 (Page ID #2222, 2224). Moore directed Liggins to drive them to a house at 5251 Kendall Street in Dearborn, Michigan. *Id.* at 164–65 (Page ID #2224–25). Moore spoke on his cell phone during the drive. *Id.* at 164 (Page ID #2224). Liggins stopped the car in front of a house at 5251 Kendall Street. He stayed in the car while Moore and Donald entered the house. *Id.* at 165 (Page ID #2226).

The only testimony as to what transpired inside the house came from Michael McGinnis. McGinnis testified that a person entered the house wearing a face mask and holding a gun. R. 8-7 (9/19/06 Trial Tr. at 154–55) (Page ID #1993–94). McGinnis lay face-down on the floor; he heard a person whose voice he did not recognize say "let it go" and then heard two shots. *Id.* at 156–57 (Page ID #1995–96). Someone stood over McGinnis, holding a gun to his head and searching through his pockets. *Id.* at 155–57 (Page ID #1994–96). The individual took between two hundred and three hundred dollars and a cell phone from McGinnis's pockets. *Id.* at 161 (Page ID #2000). McGinnis testified that he heard someone walk down the basement stairs, return from the basement, and whisper "I got shot, I got shot." *Id.* at 158 (Page ID

#1997). The individuals left the house and McGinnis went to the kitchen where he found Makki slumped over and gasping for air. *Id.* at 158 (Page ID #1998). McGinnis first took marijuana from the house and $2,400 in cash that was on his person but not taken during the robbery and put those items in his car and then sought assistance from neighbors, who contacted the police. *Id.* at 162, 164, 166 (Page ID #2001, 2003, 2005). The police responded to the house around 8:30 p.m. and pronounced Makki dead. R. 8-9 (9/21/06 Trial Tr. at 74) (Page ID #2389); R. 8-7 (9/19/06 Trial Tr. at 210) (Page ID #2049).

Liggins testified that Moore and Donald were in the house for approximately seven minutes and that he heard two or three gunshots come from the house during that time. R. 8-8 (9/20/06 Trial Tr. at 165, 176) (Page ID #2226, 2237). Liggins testified that when Moore and Donald returned to the car, both had weapons and Donald said that Moore had shot him. *Id.* at 168–69 (Page ID #2229–30). Liggins drove a few blocks away from Makki's house and saw Saine's parked car. *Id.* at 171 (Page ID #2232). Donald jumped out of Liggins's car and entered Saine's car. *Id.* at 172 (Page ID #2233). Liggins testified that he did not see or hear any phone calls being made during the time between when he left Makki's house and when he encountered Saine. *Id.* at 172 (Page ID #2233). In a statement to the police, Saine stated that Donald called him and asked Saine to pick him up because he had been shot in the foot. R. 8-9 (9/21/06 Trial Tr. at 214, 215–16) (Page ID #2529, 2530–31).

Hospital records show that Donald was taken to Sinai Grace Hospital and treated for a gunshot wound to the right foot. *Id.* at 85 (Page ID #2400). At trial, laboratory technicians testified that Donald's DNA was found on the barrel of the murder weapon, but not on the handle. R. 8-7 (9/19/06 Trial Tr. at 86) (Page ID #1924). Donald's DNA also matched drops of blood on the carpet and a piece of plastic in Moore's vehicle. *Id.*

**B. State Proceedings**

At trial, the prosecution argued that Moore, Zaya, Liggins, Saine, and Donald all participated in the plan to rob Makki. The prosecution argued that Moore shot Makki, but that Donald was guilty of felony murder through aiding and abetting. The prosecution relied on testimony and phone records showing calls between cell phones belonging to Zaya, Moore, and Saine during the day, with an increased burst of calls around the time of the incident, to show that the men together planned and executed the robbery and murder. R. 8-9 (9/21/06 Trial Tr. at 71–75) (Page ID #2386–90). During testimony from Detective-Sergeant Gary Marcetti ("Marcetti"), the prosecution introduced a demonstrative chart diagraming the phone records. Moore's attorney objected and the trial judge excused the jury to hold a conference about the chart. Donald's attorney, Richard L. Cunningham ("Cunningham"), did not join in the objection to the chart. He stated "I don't have a dog in this race. It doesn't affect me at all." *Id.* at 67 (Page ID #2382). The trial judge ruled that the chart was admissible and took a recess before calling

the jury back into the courtroom. *Id.* at 68 (Page ID #2383).

When the jury returned and the judge prepared to resume testimony, Donald's attorney Cunningham was not in the courtroom. The judge noticed Cunningham's absence and initially said that "[w]e'll wait for him," but after determining that the prosecution was going to continue with the phone-call chart, the judge decided to proceed with the trial. *Id.* at 69 (Page ID #2384). The trial judge said, "I think that since we already know Mr. Cunningham, it doesn't apply to his client, we'll go ahead and proceed with that and I'll just let him know that that's what we're doing, okay, all right." *Id.* The judge did not ask Donald if he consented to moving forward without his attorney present. The prosecution continued with Marcetti's testimony. He testified that on the day of the robbery and murder, phone calls were made from Moore's phone to Zaya's phone at 1:54 and 3:19 p.m.; Saine's phone to Zaya's phone at 3:23 and 9:17 p.m.; Saine's phone to Moore's phone at 8:17, 8:19, 8:19, 8:28, 8:32, 8:32, and 8:32 a.m. and 7:06, 7:07, 7:38, 7:41, 8:33, 8:33, 8:33, 8:57, 9:09, 9:14, 9:18, and 9:18 p.m. *Id.* at 71–75 (Page ID #2386–91).

Approximately seventeen minutes later, the transcript indicates that Cunningham returned to the courtroom. *Id.* at 68, 80 (Page ID #2383, 2395). The judge informed Cunningham that "up until that point we only were discussing the telephone chart that was there." *Id.* at 82 (Page ID #2397). Cunningham responded, "[y]es, your Honor, and as I had indicated on the record, I had no dog in the race

and no interest in that." *Id.* at 83 (Page ID #2398). Marcetti proceeded to testify to other matters. Cunningham conducted cross-examination on issues unrelated to the telephone records. *Id.* at 106–18 (Page ID #2421-33).

In closing argument, the prosecutor argued that Donald's participation in the planning and execution of the robbery constituted felony murder. The prosecution focused on McGinnis's testimony demonstrating that there were two men in the house who had a plan and worked together, R. 8-10 (9/25/06 Trial Tr. at 118) (Page ID #2698); Donald's connection to the house through his gunshot wound and his DNA on the murder weapon, *id.* at 117 (Page ID #2697); and the phone calls as indication that the robbery and Saine's pick-up of Donald and the money was pre-planned, *id.* at 128–32 (Page ID #2708–12). The prosecutor reminded the jury of Saine's statement to police that Donald called him, and emphasized that "these phone records are critical, to show the contact of all the parties to show that this is one conspiracy coming all together." *Id.* at 126, 130 (Page ID #2706, 2710).

Cory Donald was convicted of one count of felony murder and two counts of armed robbery. R. 8-11 (9/26/06 Trial Tr. at 47-48) (Page ID #2866-67). Donald was sentenced to the statutorily required prison term of life without the possibility of parole for the felony murder conviction, as well as two concurrent prison terms of ten and one-half to twenty years for the armed robbery convictions. *Id.* at 47–48 (Page ID #2866–67).

Donald appealed his conviction to the Michigan Court of Appeals and argued, amongst other issues not relevant to this appeal, that his attorney's absence during trial denied him his Sixth Amendment right to effective assistance of counsel. The Michigan Court of Appeals concluded that the absence did not occur during a "critical stage" of trial and so did not trigger a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984). Applying *Strickland v. Washington*, 466 U.S. 668 (1984), instead, the court held that the testimony that occurred during counsel's absence did not implicate Donald in the crime, so there was no reasonable probability that the presence of his counsel would have made a difference in the outcome of the trial, and thus he was not deprived of his right to effective assistance of counsel. *People v. Donald*, No. 275688, 2008 WL 1061551, at *2 (Mich. Ct. App. Apr. 10, 2008). The Michigan Supreme Court denied Donald's petition for leave to appeal. *People v. Donald*, 756 N.W. 2d 87 (Mich. 2008).

**C. Federal Proceedings**

On May 6, 2009, Donald filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. § 2254. His single claim for relief was that "the Michigan Court of Appeals rendered an unreasonable application of clearly established federal law and denied petitioner's Sixth Amendment right to counsel when it found that counsel's absence—during the prosecution's case in chief at petitioner's jury trial—occurred during a non-critical stage." R. 1 (Complaint at 3) (Page ID

#3). The district court held that the absence of counsel occurred during a critical stage under *Cronic* because Donald was charged with aiding and abetting felony murder and the absence occurred during testimony that incriminated his co-defendants in the crime. *Donald v. Rapelje*, No. 09-cv-11751, 2012 WL 6047130 (E.D. Mich. Dec. 5, 2012). Consequently, the Michigan Court of Appeals's refusal to apply *Cronic* was an unreasonable application of clearly established federal law. *Id.* at *8–12. The district court also held that the Michigan Court of Appeals unreasonably applied *Strickland* to the facts of the case. *Id.* at 12–14. Accordingly, the district court granted Donald a conditional writ of habeas corpus. Warden Rapelje appealed that decision to this court.

## II. ANALYSIS

### A. Standard of Review

"Whether the district court properly granted the writ of habeas corpus is a question of law that we review de novo." *Mitchell v. Mason*, 325 F.3d 732, 737 (6th Cir. 2003). Donald's petition for habeas corpus was filed after the Antiterrorism and Effective Death Penalty Act (AEDPA) became effective on April 24, 1996, and so we review his claim under the standards set forth in AEDPA. *See Bronaugh v. Ohio*, 235 F.3d 280, 282 (6th Cir. 2000). Under AEDPA, a habeas petitioner is entitled to relief if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). "[C]learly established Federal law for purposes of § 2254(d)(1)

includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, – U.S.–, 134 S. Ct. 1697, 1702 (2014) (internal quotation marks omitted; second alteration added). "A state court decision will be 'contrary to' our clearly established precedent if the state court either 'applies a rule that contradicts the governing law set forth in our cases,' or 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Penry v. Johnson*, 532 U.S. 782, 792 (2001) (citations omitted). "A state court decision will be an 'unreasonable application of' [the Supreme Court's] clearly established precedent if it 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000)). "[A]n 'unreasonable application of' [Supreme Court] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White*, 134 S. Ct. at 1702 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)).

Like many cases involving the absence or denial of counsel, "it is unclear whether a case such as this one is better categorized as involving an unreasonable extension of *Strickland* to the facts at hand or an incorrect choice of law in refusing to apply *Cronic*." *Mitchell*, 325 F.3d at 742. The district court analyzed whether the state court decision was an unreasonable application of clearly established federal law. In a recent case we analyzed the state courts application of *Strickland*, rather than *Cronic*, under the "contrary to" prong. *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011). We will consider both

whether the Michigan Court of Appeals's refusal to apply *Cronic* and its conclusion that Donald was not denied effective assistance of counsel was "contrary to" and an "unreasonable application of" clearly established federal law.

**B. Ineffective Assistance of Counsel**

The Michigan Court of Appeals acknowledged that *United States v. Cronic*'s presumption of prejudice applies "where the accused is denied counsel at a 'critical stage' of the proceedings."[3] *People v. Donald*, No. 275688, 275691, 2008 WL 1061551, at *1 (Mich. Ct. App. Apr. 10, 2008) (quoting *People v. Frazier*, 733 N.W. 2d 713, 720–21 (Mich. 2007)). However, the Michigan Court of Appeals then concluded that Donald's attorney's absence did not occur during a critical stage of trial because the absence was brief, the telephone records evidence did not directly implicate Donald, and both before and after the evidence was presented Donald's attorney said the evidence did not concern Donald. *Id.* at *2. Because the absence was not during a critical stage, prejudice was not presumed; the state court then held that Donald did not meet his burden under *Strickland v. Washington* of showing that he was prejudiced by his attorney's absence.

The Michigan Court of Appeals's decision ignored clear precedent from the Supreme Court that an attorney's absence during an adversarial portion of

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[3] The district court's statement that "the Michigan Court of Appeals did not cite *Cronic* at all" was incorrect. *Donald v. Rapelje*, No. 09-cv-11751, 2012 WL 6047130, at *10 n.2 (E.D. Mich. Dec. 5, 2012).

the trial that holds significant consequences for the defendant, such as the taking of evidence, is an absence during a critical stage of the trial. Because "the governing law set forth in [Supreme Court] cases," *Penry*, 532 U.S. at 792, establishes that the taking of evidence is a critical stage of trial, the state court's application of a contradictory rule—that the taking of evidence was not a critical stage—was contrary to clearly established Federal law.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The purpose of the Sixth Amendment "is to assure that the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society.'" *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985)).

On May 14, 1984, the Supreme Court issued two decisions that provide the modern framework for evaluating claims of ineffective assistance of counsel. In *Strickland v. Washington*, the Court stated that generally a defendant claiming ineffective assistance of counsel must show that his counsel's performance was deficient and prejudicial. 466 U.S. 668, 686–87 (1984). However, the Court noted that "[i]n certain Sixth Amendment contexts, prejudice is presumed" and cited the other ineffective-assistance of counsel decision of that day, *United States v. Cronic*. *Id.* at 692. In *Cronic*, the Court acknowledged the general *Strickland* rule and that "[t]here are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a

particular case is unjustified." 466 U.S. 648, 658 (1984). In three situations, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry [of prejudice to the defendant] is unnecessary" and instead the courts should simply presume prejudice. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). These situations are: when "the accused is denied counsel at a critical stage of his trial"; "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and when circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659–60.[4] The absence or denial of counsel need not be

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[4] The paradigm that prejudice is presumed when counsel is absent or denied, while a showing of actual prejudice is required when counsel made specific errors in representation, is eminently logical. *Strickland* analysis begins with a strong presumption that counsel's conduct is based on sound trial strategy. *Strickland*, 466 U.S. at 689. When counsel is present and able to exercise judgment and make strategic decisions, we can presume that counsel's silence during the taking of testimony is a strategic decision not to object or cross-examine a witness. But when counsel does not object or engage in cross-examination because he or she is absent, the silence cannot reasonably be presumed to be strategic. Rather, it is the result of the attorney's failure to fulfill the basic expectation of being present in the courtroom during the trial, and the reviewing court has simply no idea what the attorney would have done had he or she been present. Our criminal justice system depends on the presence and participation of defense counsel, so an attorney's absence during a critical stage of trial makes "the likelihood that the verdict is unreliable so high that a case-by-case inquiry [of prejudice to the defendant] is unnecessary." *Mickens*, 535 U.S. at 166.

caused by the government to trigger a presumption of prejudice under *Cronic*. A presumption of prejudice applies even where "the constraints on counsel are entirely self-imposed," *Cronic*, 466 U.S. at 662 n.31 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).

Donald argues that his case falls into the first example where prejudice must be presumed: the absence of counsel at a critical stage of trial. "[W]e easily reach the conclusion that it was clearly established by the Supreme Court, as of the time that [Donald's] case was decided in state court, that the 'complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice.'" *Mitchell*, 325 F.3d at 740 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). The question is simply whether at the time of the state court decision the holdings of the Supreme Court clearly established that the taking of evidence during trial, where that evidence inculpates the defendant, is a critical stage of the trial. We hold that it was.

The Supreme Court has explained that a critical stage of trial is a "step of a criminal proceeding that h[olds] significant consequences for the accused," *Bell v. Cone*, 535 U.S. 685, 696 (2002), and "where substantial rights of a criminal accused may be affected," *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The Court has held that prejudice is presumed when counsel is denied or absent during, *inter alia*, a trial where the attorney was representing multiple co-defendants with conflicting interests, *Holloway v. Arkansas*, 435 U.S. 475, 489–91 (1978); sentencing, *Gardner v. Florida*, 430 U.S.

349, 358 (1977); a preliminary hearing in Alabama, *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (plurality opinion); and a post-indictment lineup, *United States v. Wade*, 388 U.S. 218, 236–37 (1967).

The testimony of a government witness is similar to the trial events that the Court has deemed to be critical stages. Trial testimony occurs during a formal, adversarial proceeding that is the core of the trial. Further, trial testimony is markedly different from the matters that the Court has held are not critical stages of trial. The Court has held that the following are not critical stages of trial: a probable cause hearing "[b]ecause of its limited function and its nonadversary character," *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975); a post-indictment photo array because the defendant has no right to be present and the event is "not analogous to an adversary trial," *United States v. Ash*, 413 U.S. 300, 317–18 (1973); and the taking of a handwriting exemplar because of the limited risk that absence of counsel will deprive defendant of a fair trial and "[i]f for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial," *Gilbert v. California*, 388 U.S. 263, 267 (1967). These events are unlike the taking of evidence during trial because they are non-adversarial and occur prior to the commencement of the trial, so any defect stemming from the absence of counsel can be remedied during the trial. In contrast, the taking of testimony occurs and then it is over; an attorney cannot ask for a do-over so that he can raise an objection or observe the jury's reaction.

The dissent relies on our decision in *Muniz* to conclude that the state court's decision was not contrary to clearly established federal law. However, we issued our decision in *Muniz* on July 29, 2011, more than three years after the Michigan Court of Appeals April 10, 2008, decision in *Donald*. *Muniz*, 647 F.3d at 619; *Donald*, 2008 WL 1061551, at *1. To determine if a state court decision was contrary to, or an unreasonable application of, clearly established federal law, we consider "the holdings of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412; *see also Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) ("§2254(d)(1) requires federal courts to measure state-court decisions 'against this Court's precedent *as of the time the state court renders its decision.*'") (quoting *Cullen v. Pinholster*, 131 S. Ct. at 1399 (2011)). We do not look to the decisions of the federal courts of appeals rendered many years after the state court decision. *See also White*, 134 S. Ct. 1702 n.2 (quoting *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012)) ("a lower court may not 'consul[t] its own precedents, rather than those of this Court, in assessing' a habeas claim governed by § 2254.").

The taking of testimony at trial is the core of the adversarial proceeding and "h[olds] significant consequences for the accused." *Bell*, 535 U.S. at 696. Accordingly, by applying *Strickland*, rather than *Cronic*, the Michigan Court of Appeals "'applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases,'" *Penry*, 532 U.S. at 792, and the decision was therefore contrary to clearly established federal law.

In the alternative, the decision of the Michigan Court of Appeals was an unreasonable application of clearly established federal law because the Michigan Court of Appeals "'identifie[d] the governing legal rule"—*Cronic*—"but applie[d] it unreasonably to the facts of a particular prisoner's case.'" *Penry*, 532 U.S. at 792. The Michigan Court of Appeals concluded that *Cronic* did not apply because the absence was for only "a brief portion of the trial" and the telephone call evidence presented during Donald's attorneys' absence was not "linked to defendant Donald" and " did not directly implicate defendant Donald in the charged crimes." *Donald*, 2008 WL 1061551, at *2. The absence was not for a minute or two; Donald's attorney missed seventeen minutes of witness testimony. During Donald's attorney's absence, a government witness introduced evidence of a burst of phone calls around the time of the crime between phones belonging to Moore, Saine, and Zaya. Donald was charged with aiding and abetting felony murder; thus, evidence that tied the co-defendants together and to the crime inculpated Donald, as well. Although Donald was not named during his attorney's absence, the jury could infer from the testimony about the phone records considered in context of the other evidence at trial that Donald made one of the phone calls. Liggins testified that Donald and Moore were in his car right after the crime and that he dropped Donald off at Saine's car. R. 8-8 (9/20/06 Trial Tr. at 165, 171–72) (Page ID #2226, 2232–33). In a statement to the police that was read into evidence at trial, Saine stated that Donald called him and asked him to pick Donald up because he had been shot. R. 8-9 (9/21/06 Trial Tr. at 214, 215–16) (Page ID #2529, 2530–31).

Because there was no evidence that Donald had a cell phone, the jury could infer that Donald called Saine from Moore's phone. The significance of the telephone evidence is perhaps best exemplified by the prosecutor's reliance on the evidence in closing argument, where the prosecutor described the phone records as "critical, to show the contact of all the parties to show that this is one conspiracy coming all together." R. 8-10 (9/25/06 Trial Tr. at 130) (Page ID #2710). Given all of this, it was "objectively unreasonable," *Lockyer*, 538 U.S. at 76, for the Michigan Court of Appeals to conclude that Donald's attorney's absence did not occur during a time that held "significant consequences for the accused," *Bell*, 535 U.S. at 696. Accordingly, the Michigan Court of Appeals's conclusion that Donald was not denied effective assistance of counsel was an unreasonable application of clearly established federal law.

Therefore, the Michigan Court of Appeals's denial of Donald's ineffective assistance of counsel claim was contrary to, and an unreasonable application of, clearly established federal law.

## III. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of a conditional writ of habeas corpus to Cory Donald.

**GUY, Circuit Judge, concurring**. Donald's trial counsel declined to object to the evidence that was admitted in his absence and indicated before and after its admission that the evidence did not concern Donald. In my view, had the trial judge asked Donald if he consented to his counsel's absence

before proceeding, this case would have presented a *Strickland* claim for which it is not at all clear that prejudice could have been established. Since that did not occur, the question presented on direct appeal was whether the temporary absence of counsel during that portion of the trial constituted a "critical stage" of the criminal proceedings so as to come within the exception to *Strickland* carved out by *Cronic* for circumstances "'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Bell v. Cone*, 535 U.S. 685, 695 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658-59 (1984)). The Michigan Court of Appeals recognized that a critical stage is one that holds "significant consequences for the accused," *Bell*, 535 U.S. at 696, but found that the brief absence of defense counsel was not during a critical stage because the evidence did not "directly implicate" Donald.

The Supreme Court has not articulated a "comprehensive and final one-line definition of 'critical stage.'" *Van v. Jones*, 475 F.3d 292, 312 (6th Cir.), *cert. denied*, 552 U.S. 1064 (2007) (identifying the Supreme Court's five descriptions of a "critical stage"). This court has grappled with the Supreme Court's definitions and observed that not every ex parte situation or temporary absence of defense counsel during trial involves a critical stage of the criminal proceedings. *See, e.g., Hereford v. Warren*, 536 F.3d 523, 530 n.4 (6th Cir. 2008) (discussing cases) (finding it was objectively reasonable for the state court to conclude that ex parte side-bar conference concerning mental state of a witness did not involve a critical stage); *Green v. Arn*, 809 F.2d

1257, 1261 (6th Cir. 1987) (noting some absences of defense counsel during trial may not have constitutional significance, but finding that the taking of evidence on the defendant's guilt to be a critical stage of the trial). Whether or not relief may be granted under the "contrary to" clause of § 2254(d)(1), the district court did not err in finding that the state court's refusal to apply *Cronic* under these circumstances involved an unreasonable application of the Supreme Court's precedent regarding what is and is not a "critical stage" because, as this court's opinion points out, Donald was charged with aiding and abetting and proof as to the guilt of the principal defendants was very relevant to his guilt or innocence.

**ALICE M. BATCHELDER, Circuit Judge, dissenting.** In *Muniz v. Smith*, 647 F.3d 619, 621 (6th Cir. 2011), a criminal defense attorney fell asleep while the government was cross-examining his client, defendant Muniz, on charges of assault with intent to commit murder, felon in possession of a firearm, and carrying a concealed weapon. In his federal habeas claim of ineffective assistance of counsel, Muniz argued that the state court had erred by applying the *Strickland* standard rather than *Cronic*. *Id.* at 623. We rejected this argument, holding that "Muniz must show that his attorney slept through a substantial portion of the trial for the *Cronic* presumption of prejudice to attach." *Id.* at 625, 623. After deducing that Muniz's attorney "must have only been asleep for a brief period," not the entire cross-examination, we denied Muniz habeas relief because "[t]he state court's application of *Strickland* to Muniz's ineffective assistance of

counsel claim was not contrary to clearly established federal law." *Id.* at 624.[1]

With this in mind, I find that I must dissent here. I agree that the issue here is not whether Donald suffered prejudice from his attorney's absence, but whether his attorney was absent from a critical stage such that *Cronic* applies to his claim of ineffective assistance of counsel. *See* Lead Op. at 13; Concur. Op. at 1 ("[T]he question presented on direct appeal was whether the temporary absence of counsel during that portion of the trial constituted a 'critical stage' of the criminal proceedings so as to come within the exception to *Strickland* carved out by *Cronic*[.]"). I further agree with the concurring opinion that "[t]he Supreme Court has not articulated a comprehensive and final one-line definition of critical stage," and that the Sixth Circuit "has grappled with the Supreme Court's definitions and observed that not every ex parte situation or temporary absence of defense counsel during trial involves a critical stage of the criminal proceedings." Concur. Op. at 1 (citations and certain quotation marks omitted). This alone is enough to require the conclusion that there is no clearly established Supreme Court precedent dictating that

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[1] Because *Muniz* was a habeas claim governed by AEDPA, we were assessing the state of the law at the time of the last state court decision, which was September 21, 2006. As the lead opinion states correctly, Donald's last state court decision (April 10, 2008) pre-dates *Muniz* by three years and, therefore, *Muniz* could provide no guidance to the *Donald* court. Moreover, *Muniz* is not Supreme Court precedent. It is instead our holding of Supreme Court precedent on this issue as of September 2006. Therefore, I would follow our *Muniz* precedent here.

the taking of evidence at trial is always a critical stage for the purpose of invoking *Cronic*; nonetheless, if that were all then I might be inclined to join the concurring opinion.[2] But I believe that, with our holding in *Muniz*, 647 F.3d at 625, we have set out a standard to govern our determination of whether the taking of evidence during trial was a critical stage: i.e., whether the attorney was absent for a *substantial portion* of that testimony.

Note that, for the *Cronic* analysis, there is no difference between an attorney's being asleep and an attorney's being absent. *See id.* at 623 (citing federal cases); *Strickland*, 466 U.S. at 703 n.2 (noting that "sleeping counsel is equivalent to no counsel at all" (quotation marks and citations omitted)). Therefore, we cannot distinguish *Muniz* on the basis that one attorney was sleeping whereas the other was absent from the courtroom. Rather, it appears that *Muniz* is binding precedent and, to invoke *Cronic* here, Donald must show that his attorney was absent for a "substantial portion." *Id.* at 623.

Given our holding that Muniz's attorney's absence was insubstantial (and, therefore, the state court's application of *Strickland* was not contrary to clearly established law), it further appears that we are bound to conclude similarly that Donald's

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[2] As an aside, I certainly agree that a defendant can waive the right to counsel and, therefore, we would confront a different scenario if – as the concurring opinion proposes – the trial judge had asked and Donald had expressly consented to his counsel's absence, but I cannot agree to any implication that a defendant's consent or waiver can change a critical stage to a non-critical stage (or vice versa) for purposes of *Cronic*.

attorney's absence was equally (or more) insubstantial, and the state court's application of *Strickland* was equally appropriate.

One could argue that Donald's attorney's absence was actually more substantial because Muniz's attorney was asleep for only "an undetermined portion of a single cross-examination," *id.* at 624, while Donald's attorney was absent for a 17-minute portion of a witness's testimony (but note that *Muniz*, 647 F.3d at 623, cited only cases involving substantially longer and more frequent absences). Indeed, the lead opinion suggests that a difference between a few minutes and 17 minutes is meaningful, and that might be so, but I am not persuaded that it is meaningful here. I find it at least comparably relevant that both were single "absences" that spanned a *portion*, but not all, of the testimony – Muniz's attorney was absent for a portion of his cross-examination and Donald's attorney was absent for a portion of the phone-record-witness testimony. Furthermore, it perhaps bears consideration that in Donald's attorney's absence other co-defendants' counsel were present and, in fact, conducting cross-examination, whereas nothing in the *Muniz* opinion suggests that any other defense counsel were present while counsel slept.

On the other hand, one could make a compelling argument that Donald's attorney's absence was far *less* substantial. Muniz's attorney slept while the prosecutor cross-examined defendant Muniz – if there is a more "substantial" portion of a criminal trial than the prosecutor's cross-examination of a testifying defendant, it is not obvious what it would

be. In contrast, Donald's attorney was absent while the prosecutor introduced the co-defendants' telephone records and while one co-defendant's counsel cross-examined the witness about the same. Not only did Donald's counsel expressly disclaim any interest in that testimony, both before and after his absence, no one else then present expressed any concern about his absence: not Donald, the judge, the prosecutor, or any co-defendant's counsel. The difference in circumstances is stark.

Because I find that *Muniz* controls and Donald cannot show that his attorney was absent for a substantial portion of the trial, I would conclude that *Cronic* does not apply and the state court's application of *Strickland* was not contrary to clearly established federal law. I would therefore reverse the district court and deny habeas relief.

I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORY DONALD,
Petitioner,

v. Case No. 09-cv-11751
HON. AVERN COHN

LLOYD RAPELJE,
Respondent.
_____/

**MEMORANDUM AND ORDER CONDITIONALLY GRANTING PETITION FOR A WRIT OF HABEAS CORPUS**

## I. Introduction

This is a habeas case filed by a state prisoner under 28 U.S.C. § 2254. Michigan prisoner Cory Donald (Petitioner) is incarcerated by the Michigan Department of Corrections at the Carson City Correctional Facility in Carson City, Michigan. Petitioner is serving a life sentence for first-degree murder along with a concurrent sentence of ten-and-one-half to twenty years for armed robbery. His convictions occurred following a jury trial in the Circuit Court in Wayne County, Michigan. Petitioner, who was sixteen-years old at the time of the crime, was tried with co-defendants, Rashad Moore and Dewayne Saine under an aiding and abetting theory. Petitioner contends that he is entitled to habeas relief because his counsel was absent during a portion of the prosecution's case-in-

chief, in which a detective was testifying about phone calls made around the time of the crime from three of the co-defendants' cell phones. Respondent, through the Michigan Attorney General's office, filed a response, contending the claim lacks merit.

The parties filed briefs and the Court heard oral argument. The matter is now ready for decision. For the reasons that follow, the Court concludes that Petitioner's convictions are unconstitutional based on counsel's absence during a critical stage in the proceedings and counsel was otherwise ineffective. According, the petition will be conditionally granted.

## II. Background

### A. Trial Testimony

Petitioner's troubles in this case arise because of a shooting on November 14, 2005, in Dearborn, Michigan, which resulted in the death of Mohamed Makki. Makki was shot and killed during a robbery at a home from which he distributed marijuana. Petitioner and codefendants Moore and Saine were charged with the murder. They were tried together. Petitioner and Saine shared a jury, while Moore had a separate jury. Testimony displayed the following pertinent facts.

The prosecution's theory was that an acquaintance of Makki, Fawzi Zaya, along with Petitioner, Moore, Saine, and Seante Liggins planned, and played different roles in, the robbery in which Moore shot and killed Makki. Moore and Petitioner entered the house together and committed the murder and the robbery. Although Moore pulled

the trigger, Petitioner was guilty of the murder under an aiding and abetting theory. Petitioner was shot by Moore during the incident and blood from his wound was the only forensic evidence presented in reference to him. The prosecution's case hinged on the testimony of Liggins, its key witness, and Michael McGinnis, a drug runner present during the murder, but only able to hear what went on and was not an eyewitness to the actual murder. Liggins was facing a life sentence and chose to cooperate; he was charged with felony murder but entered into a plea agreement with the prosecution where he pleaded guilty to one count of second-degree murder, with a sentence of ten to twenty years in prison. McGinnis was arrested on drug charges stemming from the involvement in this case and was placed on probation. Petitioner's defense was that he was "merely present" and did not participate in any way.

According to Liggins's testimony, Moore drove him and Saine to a parking lot where they met Zaya. They all got into Zaya's van. They were drinking alcohol and smoking blunts of marijuana. Moore sat in the front seat, while Saine and Liggins sat in the back. Petitioner was not in the van. Zaya said he wanted them to rob Makki. Cellular telephone records showed that seven calls were placed from Saine's phone to Moore's phone between 8:17 a.m. and 8:32 a.m., on the day of the murder. Records also showed that Moore had called Zaya twice that afternoon.

Saine, Liggins, and Moore then went to a house where they continued drinking heavily. Petitioner was at the house. According to Liggins, Moore talked

to someone on his cell phone, while Petitioner and Saine walked behind the house. Liggins said he did not see Petitioner with a gun, but as the men walked back to the group, Petitioner was "situating something on his hip" in a way that led him to believe that he had a gun. Trial Tr. vol. III, 162 Sept. 20, 2006, ECF No. 8-7.

Liggins further testified that Moore said "it's about that time," which Liggins interpreted as meaning that it was time to do the robbery. Trial Tr. vol. III, 159 Sept. 20, 2006, ECF No. 8-7. Petitioner, Saine, and Moore were together when Moore made the statement. Liggins said there were numerous phone calls between Moore, Saine, and Zaya throughout the evening.

Petitioner, Liggins, and Moore then got into a white Taurus. Liggins did not see where Saine went. The men were dressed in black skull caps and black coats. Liggins saw a ski mask in the car on the back seat but could not recall if anyone put it on.

Moore instructed Liggins to drive. Moore sat in the front passenger seat and talked on his cell phone while Petitioner sat in the back seat. Moore directed Liggins as he drove. Following Moore's directions, Liggins ended up at a house in Dearborn, Michigan. He was not familiar with the house. He remained inside the car while Petitioner and Moore got out. He did not see either man with a gun. Petitioner and Moore went inside the house.

Liggins testified that, when Petitioner and Moore returned to the car, both were carrying guns. He was not sure what type of gun Moore had, but Petitioner's

gun looked like a nine-millimeter handgun. He had previously seen Saine carrying that gun. Liggins saw blood on the leg of Petitioner's pants. Petitioner told him that Moore shot him.

Liggins further testified that he drove Petitioner and Moore away from the house. He said Moore asked Petitioner, "what you get?" Trial Tr. vol. III, 170 Sept. 20, 2006, ECF No. 8-7. When Petitioner replied, "320," *id.*, Moore said, "that's it?" "We got to go back." *Id.* Liggins then saw Saine's car parked a couple of blocks away. Saine was in the car. Petitioner jumped out of his car and got inside Saine's car.

McGinnis also testified. He was a drug runner for Makki and was inside the house at the time of the incident. The men sold drugs together and he was there to pay off a drug debt and to purchase more marijuana. He was watching television and talked to Makki as he got ready for work. Over the course of about twenty or thirty minutes, Makki received several phone calls. They were about to leave the house when they heard a creak near the front door. Makki went to the door and McGinnis heard him say, "oh, shit." Trial Tr. vol. II, 154 Sept. 19, 2006, ECF No. 8-6. McGinnis said Makki put his hands over his head as the door swung open and a man entered with a handgun. The intruder was a black man, wearing a knit cap, a face mask, and a Carhartt jacket.

McGinnis further testified that Makki then backed into the room. McGinnis said he laid face-down on the floor with his hands on top of his head and could only hear what went on the rest of the

time. He heard two people moving around the house. He heard scuffling in the kitchen and heard someone other than Makki say, "let it go." Trial Tr. vol. II, 156 Sept. 19, 2006, ECF No. 8-6. He then heard two gunshots. After the shots were fired, one of the intruders stood over him with a gun. While searching his pockets, the man said, "what you got, what you got" and "he keep the shit in the basement." *Id.* at 157, ECF No. 8-6. The man took $300 and a cell phone from him. McGinnis heard the second person walking downstairs into the basement. The man soon returned from the basement and said, "I got shot, I got shot" to the person who had been standing over him with the gun. *Id.* at 158, ECF No. 8-6. The men then left.

McGinnis then got up, looked in the kitchen and saw Makki sitting with his back against the refrigerator. McGinnis took a bag of marijuana from the kitchen counter and put it in the trunk of his car. He also hid $2,400 in the trunk of his car. He then went to neighboring houses to get help.

At the second house, McGinnis met Caressa Stanford. According to Stanford, McGinnis told her that two men wearing masks forced their way into the house and robbed them. He told her that one of the men stood over him with a gun and that there was a fight during which he heard gunshots. McGinnis and Stanford then went inside Makki's house and saw him lying on the floor. They drove to a nearby gas station and called the police.

The police were at Makki's house by the time McGinnis and Stanford returned. Makki was pronounced dead at the scene. Officer James

Herberger responded to the call and found him lying in the kitchen.

Dearborn Police Officers Mark Gorby and Ashley Tapping were in the area, when they saw a white Taurus stopped in the middle of the road. The Taurus slowly passed the officers as they began to pull the patrol car into the street. The Taurus then stopped near the curb, two or three car lengths in front of the officers. When Officer Tapping drove the patrol car alongside the Taurus, Officer Gorby saw two people in the front seat. The Taurus then cut in front of the patrol car. The officers attempted to stop the Taurus, but the car drove away, running three or four stop signs before coming to a dead-end street.

The officers saw the driver of the Taurus jump out of the car as it came to a stop. That man fled on foot. Officer Gorby saw a black object being tossed from the car. As the officers approached with their guns drawn, Moore stepped out of the passenger-side door, with his hands in the air. Moore told them that he had just been picked up at the bus stop and had no idea what was going on.

Officer Gorby retrieved the black object and discovered that it was a black knit cap containing small baggies of marijuana.

The evidence technician who examined the Taurus after it was impounded found a black, nine-millimeter handgun on the front passenger's side floorboard and a black-knit mask on the front passenger seat. McGinnis's cell phone was on the driver's side floorboard. A do-rag was on the driver's

side of the back seat. A black-knit cap also was found on the passenger's side of the back seat.

Officer Gorby searched Moore at the police station. Moore was wearing a black Carhartt jacket and black pants. He also found keys, a Sprint cell phone, a wallet containing $31 and $2,020 that was tucked inside the waistband of Moore's underwear. The keys were for Makki's house and his truck.

DNA testing showed that Petitioner's blood was found on the barrel of the gun, a cellophane wrapper found on the front passenger floorboard, and three samples of carpet from the front passenger floor. Moore's blood was found on another cutting of carpet taken from the front passenger floor. Moore's DNA also was recovered from the black-knit cap.

Makki died of a single gunshot wound to the back. There was a hole in Makki's vest and shirts; gunshot residue also was found on the vest. A spent bullet was recovered from the waistband of his pants. In the living room of the home, the police found a spent bullet on a chair, a live nine-millimeter bullet on the floor, and two spent nine-millimeter casings, one of which was near the entrance to the dining room. The nine-millimeter handgun found in the Taurus fired the spent cartridges and the spent bullets.

McGinnis told the police about the robbery. Initially, he said he was at Makki's house because they were going to go to the casino. When McGinnis learned that Makki had died and that the police would search the car in which he had hidden the

drugs and money, he told the police about those items.

Liggins was arrested a few hours after the murder. After fleeing the car, he had jumped over fences and discarded his coat and skull cap. He initially told the police that he was with his girlfriend at her aunt's house until 2:00 or 2:30 in the morning. He said they left the house to go to a show. He said his girlfriend kicked him out of the car because he called her another girl's name by mistake. He said he walked to a liquor store and bought a bottle of gin.

On the day Liggins was arraigned on murder charges, he made another statement to the police. He said Moore and another man picked him up and that he had asked Moore to buy a bag of weed. Moore asked him to drive. They went to a house in Dearborn. He said Moore and another man went into the house, and about four or five minutes later, he heard two or three shots. He said he was about to leave when the two men ran back to the car. Moore was holding a gun. He said he panicked and drove off. At trial, Liggins admitted that he did not tell the truth in his statement. He said he knew Moore was already in custody. He did not name Petitioner and Saine because he did not want to turn in his friends.

Saine was arrested on December 2, 2004. During questioning, Saine told a detective that he took Petitioner to the hospital because he had been shot.

## B. Admission of the Phone Calls

In addition to relying on McGinnis's and Liggins's testimony, the prosecution used phone records to tie all of the men together on the day of the murder. Calls were made from the phones of Zaya, Moore, and Saine throughout the day, specifically around the time of the offense. That evidence was admitted through Detective Gary Marcetti.

In conference outside the presence of the jury, Saine's attorney objected to the introduction of the exhibit. Petitioner's attorney did not object, stating "I don't have a dog in this race. It doesn't affect me at all." Trial Tr. vol. IV, 67 Sept. 21, 2006, ECF No. 8-8. After the judge ruled the chart admissible, a short break was taken before the judge called the jury back into the courtroom.

When the proceedings resumed, Petitioner's attorney was not present. Although the trial court initially stated that he would wait for Petitioner's attorney to return, he ordered the trial to resume since Petitioner's attorney said the exhibit did not relate to his client. The trial court neither informed Petitioner of his right to have counsel present before the testimony resumed nor asked for his consent to proceed with the testimony in the absence of his counsel.[1] The record shows the following exchange took place in the presence of the jury:

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[1] The testimony which took place which Petitioner's counsel was absent is discussed in detail infra.

The Court: [Petitioner's trial counsel] stepped away. We'll wait for him. I didn't realize he was not there, so he should be here momentarily. Are we going on with the chart next that we just did beforehand?

The Prosecutor: Yes, sir.

The Court: I think that since we already know [Petitioner's trial counsel], it doesn't apply to his client, we'll go ahead and proceed with that and I'll just let him know that's what we're doing, okay, all right. So if we [sic] just talking about that particular matter we have before we had the break, let's go ahead and get it done.

Trial Tr. vol. IV, 69 Sept. 21, 2006, ECF No. 8-8.

Petitioner's counsel was absent for approximately fifteen minutes, during which Sergeant Marcetti was examined by the prosecutor and cross-examined by counsel for Saine and Moore. Prior to redirect, the record shows the following:

The Court: Just for the record here, note [Petitioner's trial counsel] is now here, and up until that point we only were discussing the telephone chart that was there, [Petitioner's trial counsel]

Petitioner's trial counsel: Yes, your Honor, and as I had indicated on the

record, I had no dog in the race and no interest in that.

The Court: I just wanted to have the record reflect that.

*Id.* at 82-83.

In closing argument, the prosecutor used the phone calls to show that Saine and Petitioner were both involved in the robbery and murder. She said Saine had been there to pick up Petitioner, and the proceeds of the robbery, as shown by the times that the calls were made. The prosecutor intimated that the calls were proof of the planning of the robbery, the carrying out of the plan, and the subsequent discussion following the robbery, and thus, linked all the men together, including Petitioner.

The prosecutor also used a statement given by Saine, which was read into the record through Detective Marcetti, as further proof of Petitioner's involvement, and in support of the phone-call testimony. Saine told the police that he had met his friends not far from Makki's house in response to a phone call from Petitioner. According to Saine's statement, Petitioner told him that he had been shot by Moore and needed to go to the hospital. Saine said he called Moore, who did not say why Petitioner had been shot. In closing arguments, the prosecutor used the phone logs to argue that Saine's pick-up location was a preplanned and prearranged position set in order to pick up his buddy that he gave the gun to, who had the cash, and who had been in the basement to get rid of the evidence, referring to Petitioner.

The prosecutor relied on an "aiding and abetting" theory of felony murder for both Petitioner's and Saine's convictions. The judge instructed the jury accordingly.

## III. Procedural History

The jury found Petitioner guilty. He was sentenced as described above.

Petitioner filed a direct appeal with the Court of Appeals, raising the same claim raised in his petition here. He also filed a supplemental brief concerning the effectiveness of counsel, with respect to the prosecutor's misconduct in vouching for the credibility of Liggins, and the sufficiency of the evidence, with respect to the evidence of premeditation. The Michigan Court of Appeals affirmed his convictions. *People v. Donald*, No. 275688, 2008 WL 1061551 (Mich. Ct. App. Apr. 10, 2008). The Michigan Supreme Court denied leave to appeal. *People v. Donald*, 482 Mich. 1006 (2008) (Table).

Petitioner neither filed a post-conviction motion with the trial court nor a petition for a writ of certiorari with the United States Supreme Court. Rather, he filed the instant petition.

## IV. Standard of Review

Petitioner is entitled to a writ of habeas corpus only if he can show that the state court's adjudication of his claims on the merits-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court's decision is an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citations omitted).

More recently, the United States Supreme Court held that "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness

of the state court's decision." *Harrington v. Richter*, 562 U.S. ---, ---, 131 S.Ct. 770, 786 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). Section 2254(d) does not completely bar federal courts from relitigating claims that have previously been rejected in the state courts, but rather, it preserves the authority for a federal court to grant habeas relief only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" the Supreme Court's precedents. *Id.* Indeed, "[s]ection 2254(d) reflects the view that habeas corpus is a 'guard against *extreme malfunctions* in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (emphasis added) (citing *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)); *see also Swanigan v. Sherry*, No. 09-2606, 2012 WL 4946291, at *1 (6th Cir. Oct. 18, 2012) (habeas relief is reserved for *extreme malfunctions* by the state courts).

Thus, in order for Petitioner to obtain habeas relief in this Court, "[he] must show that the state court's ruling on the claim being presented in [this Court] was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at ---, 131 S.Ct. at 786-87. Additionally, the Court's review of habeas cases is "limited to the record that was before the

state court." *Cullen v. Pinholster*, 563 U.S. ---, ---,131 S.Ct. 1388, 1398 (2011).

## V. Discussion Absence of Counsel

Petitioner claims that his Sixth Amendment right to effective assistance of counsel was violated when his attorney was absent during a portion of the prosecution's case-in-chief in which the lead detective, Detective Marcetti, was testifying about phone calls made around the time of the murder from three of the codefendants' cell phones. He argues that, under the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), the temporary absence of counsel gives rise to an irrebuttable presumption of prejudice, and he is entitled to habeas relief because prejudicial testimony was taken while his trial counsel was absent. Respondent counters that no prejudicial testimony was taken during counsel's absence and that Petitioner is not entitled to a presumption of prejudice under *Cronic*.

As explained below, the Court finds that Petitioner was denied counsel at a critical stage, an error that is structural in nature. Thus, he need not demonstrate that the error prejudiced the outcome of his case. *Cronic*, 466 U.S. at 658. Rather, the existence of such a defect requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (citations omitted).

### A. Analysis under *Cronic*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence." U.S. Const. amend VI. The "plain wording of [that] guarantee thus encompasses counsel's assistance whenever necessary to assure meaningful 'defence.'" *United States v. Wade*, 388 U.S. 218, 225 (1967).

After "the adversary judicial process has been initiated," a defendant has a Sixth Amendment right to counsel to assist him "at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citations omitted). "This right has been accorded, 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658; *see also Mickens v. Taylor*, 535 U.S. 162, 166, (2002) (same); *Ayers v. Hudson*, 623 F.3d 301, 308-309 (6th Cir. 2010) (same). A "critical stage" is one where there is a reasonable likelihood that counsel's absence will result in substantial prejudice to the defense, meaning that "an opportunity may be irretrieveably lost, or material may come out that may be incurably damaging." *Van v. Jones*, 475 F.3d 292, 315 (6th Cir. 2007); *see also Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (A critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected."); *Wade*, 388 U.S. at 224 (a "critical stage" is one "where the results might well settle the accused's fate and reduce the trial itself to a mere formality.").

The absence of counsel at critical stages presents grave potential for prejudice, which may not be capable of reconstruction at trial. *Missouri v. Frye*, --- U.S. ---, ---, 132 S.Ct. 1399, 1405 (2012). A criminal defendant has the right to the advice of counsel at "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Wade*, 388 U.S. at 226 (footnote omitted).

In *Van*, the Sixth Circuit articulated the following in order to determine if an event rises to the level of a critical stage of the proceedings such that a habeas petitioner need not demonstrate actual prejudice:

> 1) A critical stage presents a moment when "[a]vailable defenses may be irretrievably lost, if not then and there asserted." [*Hamilton v. Alabama*, 368 U.S. 52, 53 (1961)].
>
> 2) A critical stage is one "where rights are preserved or lost." [*White v. Maryland*, 373 U.S. 59, 60 (1963)].
>
> 3) Counsel's assistance is guaranteed "whenever necessary to mount a meaningful defence." [*United States v. Wade*, 388 U.S. 218, 225 (1967) (internal quotation marks omitted)].
>
> 4) Determination as to "whether a hearing is a 'critical stage' requiring the provision of counsel depends [] upon an analysis 'whether potential substantial prejudice to defendant's

> rights inheres in the * * * confrontation and the ability of counsel to help avoid that prejudice.'" [*Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (quoting *Wade*, 388 U.S. at 227)].
>
> 5) A critical stage holds "significant consequences for the accused." [*Bell v. Cone*, 535 U.S. 685, 696 (2002)].
>
> 6) In *Lundberg*, our court defined a "floor" for analysis as to whether a phase in a criminal proceeding may be considered critical. We do not label as a critical stage "proceedings where even the likelihood of later prejudice arising from the failure to appoint is absent." [*Lundberg v. Buckhoe*, 389 F.2d 154,158 (6th Cir. 1968) (quoting *DeToro v. Pepersack*, 332 F.2d 341, 343-44 (4th Cir.1964))].

*Van*, 475 F.3d at 312. "Deciding whether a particular part of a criminal proceeding holds consequences, is necessary to mount a meaningful defense, or contains potential substantial prejudice to rights demands an inquiry into the *possibility* of consequences." *Id.* (emphasis in original). The *Van* Court found that in order to evaluate if a portion of a criminal proceeding is a critical stage, a court "must ask how likely it is that significant consequences might have resulted from the absence of counsel at the stage of the criminal proceeding." *Id.* at 313.

Here, whether a proceeding is a critical stage depends on whether there was a reasonable probability that Petitioner's case could suffer significant consequences from a total denial of counsel at that particular part of the proceeding,

namely when defense counsel was absent when Detective Marcetti was testifying about the phone calls. The question is whether the testimony is part of the criminal proceedings and whether it is a critical stage.

The last court to issue a decision in this case, the Michigan Court of Appeals, stated:

> The record discloses that before counsel's absence, the trial court and the defense attorneys for the other codefendants discussed, outside the juries' presence, a record of cell phone calls that were made to and from codefendant Moore, codefendant DeWayne Saine, and an alleged accomplice, Fawzi Zaya. Defendant Donald was not linked to any of the telephone calls and defendant Donald's trial attorney informed the court that he was not joining in an objection to the telephone records by the other codefendants, remarking "I don't have a dog in this race. It doesn't affect me at all." When the juries returned, defendant Donald's attorney was absent from the courtroom. Because the telephone record evidence did not concern defendant Donald, the trial court decided to proceed to take testimony concerning the records without waiting for defendant Donald's attorney to return, explaining "it doesn't apply to his client." The prosecutor thereafter admitted a chart of the cell phone records, and testimony was received concerning the cell phone records, the phone numbers, and the times of

the calls listed on the chart. Shortly thereafter, defendant Donald's attorney returned. The trial court remarked that, during counsel's absence, "we only were discussing the telephone chart that was there."

Defendant Donald's attorney responded, "Yes, your Honor, and as I indicated on the record, I had no dog in the race and no interest in that."

Defendant Donald now argues that he is entitled to a new trial without the necessity of showing actual prejudice because his attorney was absent during a critical stage of the trial and, therefore, prejudice must be presumed. We disagree.

A critical stage is one that holds "significant consequences for the accused." In this case, defendant Donald's attorney was absent for a brief portion of the trial during which evidence of telephone records was received. None of the telephone calls were linked to defendant Donald, however, and the telephone record evidence did not directly implicate defendant Donald in the charged crimes. Both before and after the evidence was introduced, defendant Donald's attorney remarked that the evidence did not concern defendant Donald. Under these circumstances, we cannot conclude that defense counsel was absent during a critical stage of the trial. Therefore, defendant

> Donald is not entitled to a presumption of prejudice arising from counsel's absence.

*Donald*, 2008 WL 1061551, at *1-2 (citations omitted).

The Michigan Court of Appeals erred in not applying *Cronic*.[2] Because Petitioner's criminal liability was based on the action of others and the prosecution used the theory of aiding and abetting as a basis for his conviction, *Cronic* does in fact apply, and counsel's conduct, in leaving the courtroom during a critical stage of the proceeding, is presumptively prejudicial. *See United States v. Russell*, 205 F.3d 768, 771 (5th Cir. 2000). *Cronic* applies when a defendant is charged with conspiracy and his counsel leaves the room while testimony was being presented which incriminated the codefendants. *Id.* "As the government builds its case against any co-conspirator, the conspiracy is more clearly established and all of the co-conspirators become more tightly linked." *Id.* at 772. In this case, showing a link between the codefendants with Detective Marcetti's testimony regarding the calls "inferentially increase[s] the taint of guilt" against Petitioner. *Id.* "Evidence relevant to the establishment of the same conspiracy with which any conspirator is charged is likely to be relevant as to any other co-conspirator." *Id.*

---

[2] Indeed, the Michigan Court of Appeals did not cite *Cronic* at all. Rather, it framed the claim in terms of ineffective assistance of counsel and applied the Supreme Court's decision in *Strickland v. Washington*. This point is discussed *infra*.

Additionally, the Sixth Circuit has held that "[w]hen the government presents evidence probative of a defendant's culpability in criminal activity, or evidence that further implicates a defendant in criminal conduct, that portion of a criminal trial is sufficiently critical to the ultimate question of guilt to trigger the protections of *Cronic*." *Olden v. United States*, 224 F.3d 561, 568 (6th Cir. 2000) (citations omitted); *Atkinson v. United States*, 80 F. App'x 422, 2003 WL 22495831, at *3 (6th Cir. 2003). Because Petitioner's counsel was absent during the taking of testimony which tended to incriminate the codefendants, Petitioner was unable to challenge the "implicit connection between himself and his codefendants." *Russell*, 205 F.3d 772; *cf Vines v. United States*, 28 F.3d 1123, 1126 (11th Cir. 1994) (finding that taking evidence relating to a codefendant's guilty is not presumptively prejudicial when the defendant has agreed to counsel's absence). Unlike the defendant in *Vines*, in this case, Petitioner did not consent to counsel's absence.

During the prosecutor's case-in-chief, she called Detective Marcetti to the stand and used a demonstrative exhibit that diagramed a burst of phone calls made around the time of the murder from the phones of codefendants Moore, Saine, and Zaya. Detective Marcetti took the stand during the prosecution's case-in-chief, a critical stage of the proceedings. *Wade*, 388 U.S. at 226-27; *see also Green v. Arn*, 809 F.2d 1257, 1261-63 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806, *reinstated*, 839 F.2d 30 ("It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt.") (citation omitted). Because

defense counsel removed himself from the courtroom, he missed Detective Marcetti's testimony about the phone calls to and from Moore's, Saine's, and Zaya's phones on the day of the murder; testimony that was potentially damaging to his client.

Detective Marcetti testified that, during the initial investigation, he took a statement from Saine about the content of the calls. Saine said that "youngin" called him to tell him that Moore shot him. Trial Tr. vol. IV, 214 Sept. 21, 2006, ECF No. 8-8. Saine also said that "youngin" asked him to pick him up. *Id.*, ECF No. 8-8. He identified "youngin" as Petitioner. Since there was no evidence that Petitioner had a cell phone and, since Liggins testified that Moore and Petitioner were together in his car, the jury could have inferred that some of the calls, referred to by Detective Marcetti's testimony, were actually made by Petitioner. The diagram showed that Saine called Moore twelve times shortly before and after the murder.

Furthermore, during closing argument, the prosecutor used the burst of calls around the time of the murder testified to by Detective Marcetti, as well as Saine's location near the seen, to argue that Petitioner's presence was not coincidental. Rather, the prosecutor argued that the evidence was critical to demonstrating conspiracy; both Saine's and Petitioner's involvement was prearranged and preplanned. In her closing, she said "that's why these phone records are critical, to show the contact of all parties to show that this is one conspiracy coming all together." Trial Tr. vol. V. 130, Sept. 25, 2006, ECF No. 8-9. Saine "was there already waiting to pick up

[Petitioner], pick up the cash, pick up everything that [Petitioner] took out of that house." *Id.* at 136, ECF No. 8-9. The prosecutor argued that Saine then was responsible for "reporting back" to Zaya with the proceeds. *Id.* at 130, ECF No. 8-9. She said the calls showed that there was an arrangement between Zaya, Saine, Moore, and Petitioner, thereby refuting Petitioner's "mere presence" defense. The prosecutor used the phone-call evidence to paint a broad brush of an overall case against Petitioner. Thus, the calls were relevant to his case; they were used to implicate him in the murder.

The fact that Petitioner was tried with Moore and Saine does not change the critical-stage analysis, because Petitioner's counsel argued that Petitioner was at the scene, "merely present," but did not take part in the robbery. Therefore, the evidence of codefendants' guilt was essential to his own conviction; it was directly relevant to his case, as he was charged with aiding and abetting in murder. The phone calls, along with the evidence of Saine's statement and his presence near the crime scene, tended to link the defendants together in the criminal conduct. Petitioner's counsel was not present during the critical testimony of Detective Marcetti. Petitioner's counsel's presence was necessary to keep the taint of conspiracy from spreading to his client. It was a lost opportunity that was damaging to Petitioner.

Moreover, the judge also instructed the jury that in order to find Petitioner and Saine guilty, it must find beyond a reasonable doubt that "the alleged crime was actually committed by either [Petitioner]

or someone else." Trial Tr. vol. IV, 20 Sept. 26, 2006, ECF No. 10.

Against this backdrop, Petitioner was denied counsel during that stage of the proceedings; his rights under the Sixth Amendment were violated. The Michigan Court of Appeals's decision, to apply a *Strickland* analysis, rather than a *Cronic* analysis to Petitioner's case, was an "*extreme malfunction*," *Harrington*, 562 U.S. at ---, 131 S.Ct. at 786-87 (emphasis added), and thus an unreasonable application of clearly established federal law, i.e., the law regarding absence of counsel established in *Cronic*. *See Mitchell v. Mason*, 325 F.3d 732, 742 (6th Cir. 2003) (explaining that an application of *Strickland* to a particular case rather than *Cronic*, would either be "an unreasonable extension of *Strickland* to the facts at hand or an incorrect choice of law in refusing to apply *Cronic*" ). Rather, the Court finds that *Cronic* applies. Petitioner's counsel's absence during the described critical stage of his proceedings violates his constitutional rights under the Sixth Amendment and entitles him to habeas relief.

However, even if *Cronic* did not apply to Petitioner's case, counsel's performance fails under a *Strickland* analysis, as discussed below.

### B. Analysis under *Strickland*

Under *Strickland*, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and prejudice. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). In evaluating whether counsel's performance was

deficient, "the court must defer to counsel's tactical decisions," avoid "the distorting effects of hindsight" and give counsel the benefit of a strong presumption of reasonableness. *Id.* at 689. Prejudice is established if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quotations omitted).

With respect to the performance prong, Petitioner must identify acts that were "outside the range of professionally competent assistance" in order to prove deficient performance. *Strickland*, 466 U.S. at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. There is a strong presumption that counsel rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Id.* at 686.

The Supreme Court has recently stated that a federal court's consideration of ineffective-assistance-of-counsel claims arising from state criminal

proceedings is quite limited on habeas review due to the deference afforded trial attorneys and state appellate courts reviewing their performance. "The standards created by *Strickland* and [section] 2254(d) are both 'highly deferential' and when the two apply in tandem, review is 'doubly' so. *Harrington*, 562 U.S. at ---, 131 S.Ct. at 788 (internal and end citations omitted). "When [section] 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. *Id.*

The Michigan Court of Appeals, addressing this claim in a single, three-sentence paragraph, found that *Cronic* did not apply, applied the *Strickland* standard, and denied relief. The court of appeals stated:

> Instead, review of defendant Donald's ineffective assistance of counsel claim is governed by the test developed in *Strickland*, *supra*, which places the burden on the defendant to establish that he was prejudiced by counsel's alleged deficient performance. Defendant Donald has not met that burden. Because defendant Donald was not linked to the series of telephone calls, and the telephone record evidence did not implicate defendant Donald in the charged crimes, there is no reasonable probability that the outcome of the trial would have been different had counsel been present during the initial portion of this testimony.

*Donald*, 2008 WL 1061551, at *2.

This conclusion is contrary to *Strickland*, because defense counsel's performance fell below an objective standard of reasonableness and prejudiced Petitioner. Counsel exercised bad judgment in removing himself from the courtroom. Counsel left the courtroom, during the State's case-in-chief, while a prosecution witness testified about cell phone calls that took place around the time of the robbery and murder of Makki, which linked all the defendants together and tended to provide proof of the crime. Although counsel was able to view the evidence before he left the courtroom, counsel's conduct was unreasonable considering the fact that Petitioner was being tried on an aiding and abetting theory and his defense was "mere presence." Counsel removed himself from the courtroom and from the sight of the jury during a time in the proceedings where Petitioner's substantial rights were concerned, where there was an opportunity for prejudicial testimony to be taken, and where Petitioner neither conceded to his absence nor wanted him to leave. Counsel's absence deprived Petitioner of a fair trial.

The phone-call evidence was pivotal in linking all defendants together and providing proof of their planning and execution of the murder. It also linked their behavior after the murder. The phone-call evidence made a stronger case against Petitioner in that he was more than "merely present," but rather, he participated in the criminal enterprise. The evidence was critical to his conviction. In fact, the prosecutor entered a statement into the record, through Detective Marcetti, made by Petitioner's codefendant, Saine, stating that Petitioner had made a phone call to Saine. "On November 14th I was

called by my little homie on Monday is under November 14 (sic). Youngin [Petitioner] to come pick him up because he had been shot and that he was shot by Big Cous [Moore] in the foot and to come pick him up and I did." Trial Tr. vol. IV 214, Sept. 21, 2006, ECF No. 8-8.

Here, Petitioner's defense, that he was "merely present" during the incident, was being challenged. The evidence goes directly to the prosecution's burden of proof against Petitioner. Counsel missed his opportunity to cross examine Detective Marcetti regarding his client's association in the criminal enterprise. Had he been present, counsel could have objected to some of the testimony, and if overruled, could have requested a limited instruction as to Petitioner.

Moreover, the trial court's actions contributed to the situation adversely affecting Petitioner. After Petitioner's counsel left the courtroom and the examination of Detective Marcetti began, the trial court did not consult with Petitioner about his attorney's absence. Rather, the trial court, the prosecution, and the other attorneys decided that they could proceed. In such a situation, where the impairment of Petitioner's Sixth Amendment right was easy to identify and prevent, the State acted to further the deprivation. *Strickland*, 466 U.S. at 692.

Respondent's argument that the *Strickland* claims must be given particular deference is not persuasive. *See Knowles v. Mirzayance*, 556 U.S. 111 (2009) (reversing lower court which did not analyze claim under correct *Strickland* standard); *Panetta v. Quarterman*, 551 U.S. 930, 953 (2007) ("the standard

[] stated in general terms does not mean the application was reasonable"); *see also Porter v. McCollum*, 558 U.S. 30 (2009) (finding state-court decision regarding *Strickland* prejudice unreasonable).

## VI. Conclusion

For the reasons stated above, the Michigan Court of Appeals (1) erred when it failed to apply *Cronic* and (2) erred in its application of *Strickland*. Petitioner is therefore entitled to habeas relief. The Michigan Court of Appeals' decision was contrary to existing Supreme Court precedent with respect to *Cronic* and was an unreasonable application of the facts as to *Strickland*. In so concluding, the Court is mindful of the deference afforded to state courts on habeas review, which the Supreme Court has recently reiterated. However, the circumstances in this case justify, indeed compel, the federal court intervention to correct errors of constitutional magnitude.

Accordingly, the petition for a writ of habeas corpus is conditionally GRANTED. The State must afford Petitioner a new trial within ninety (90) days from the date of this order or Petitioner may apply for a writ ordering Respondent to release him from custody.

SO ORDERED.

Dated: December 5, 2012 S/Avern Cohn
UNITED STATES
DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, December 05, 2012, by electronic and/or ordinary mail.

S/Sakne Chami
Case Manager, (313) 234-5160

**Order**

**Michigan Supreme Court**
**Lansing, Michigan**

October 1, 2008

Clifford W. Taylor,
Chief Justice

136575

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 136575
COA: 275688
Wayne CC: 06-003170-01

CORY LEE DONALD,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the April 10, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 1, 2008

*Corbin R. Davis*
Clerk

**STATE OF MICHIGAN**

**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORY LEE DONALD,

Defendant-Appellant.

UNPUBLISHED
April 10, 2008

No. 275688
Wayne Circuit Court
LC No. 06-003170-01

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHAD LEE MOORE,

Defendant-Appellant.

No. 275691
Wayne Circuit Court
LC No. 05-012835-01

---

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendants Cory Lee Donald and Rashad Lee Moore were tried jointly, before separate juries. Both defendants were convicted of first-degree felony murder, MCL 750.316(1)(b), and two counts of armed robbery, MCL 750.529, and defendant Moore was also convicted of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission of a felony (second offense), MCL 750.227b. Defendant Donald was sentenced to life imprisonment for the murder conviction and 10-1/2 to 20 years' imprisonment for each armed robbery conviction. Defendant Moore was sentenced to life imprisonment for the murder conviction, 15 to 30 years' imprisonment for each armed robbery conviction, three to five years' imprisonment for the felon in possession and CCW convictions, and a consecutive five-year term of imprisonment for the felony-firearm conviction.[1] Defendant Donald appeals as of right in Docket No. 275688, and defendant Moore appeals as of right in Docket No. 275691. We affirm.

## I. Docket No. 275688 (Defendant Donald)

### A. Absence of Counsel

Defendant Donald argues that he was denied his Sixth Amendment right to the effective assistance of counsel when his trial attorney was absent during a portion of the trial without defendant Donald's consent.

---

[1] The trial court subsequently vacated one of the armed robbery sentences for each defendant.

As our Supreme Court observed in *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007):

> Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland* [*v Washington*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 674 (1984).] Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error.
>
> But in [*United States v*] *Cronic* [466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)], the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a "critical stage" of the proceedings. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, the difference is not of degree but of kind. [Footnote and some citations omitted.]

The record discloses that before counsel's absence, the trial court and the defense attorneys for the other codefendants discussed, outside the juries' presence, a record of cell phone calls that were made to and from codefendant Moore, codefendant DeWayne Saine, and an alleged accomplice, Fawzi Zaya. Defendant Donald was not linked to any of the

telephone calls and defendant Donald's trial attorney informed the court that he was not joining in an objection to the telephone records by the other codefendants, remarking "I don't have a dog in this race. It doesn't affect me at all." When the juries returned, defendant Donald's attorney was absent from the courtroom. Because the telephone record evidence did not concern defendant Donald, the trial court decided to proceed to take testimony concerning the records without waiting for defendant Donald's attorney to return, explaining "it doesn't apply to his client." The prosecutor thereafter admitted a chart of the cell phone records, and testimony was received concerning the cell phone records, the phone numbers, and the times of the calls listed on the chart. Shortly thereafter, defendant Donald's attorney returned. The trial court remarked that, during counsel's absence, "we only were discussing the telephone chart that was there." Defendant Donald's attorney responded, "Yes, your Honor, and as I indicated on the record, I had no dog in the race and no interest in that."

Defendant Donald now argues that he is entitled to a new trial without the necessity of showing actual prejudice because his attorney was absent during a critical stage of the trial and, therefore, prejudice must be presumed. We disagree.

A critical stage is one that holds "significant consequences for the accused." *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). In this case, defendant Donald's attorney was absent for a brief portion of the trial during which evidence of telephone records was received. None of the

telephone calls were linked to defendant Donald, however, and the telephone record evidence did not directly implicate defendant Donald in the charged crimes. Both before and after the evidence was introduced, defendant Donald's attorney remarked that the evidence did not concern defendant Donald. Under these circumstances, we cannot conclude that defense counsel was absent during a critical stage of the trial. See *Vines v United States*, 28 F3d 1123, 1125-1127 (CA 11, 1994) (declining to hold that counsel was absent during a critical stage of trial within the meaning of *Cronic* where no evidence directly inculpating the defendant was presented while that defendant's counsel was absent). Therefore, defendant Donald is not entitled to a presumption of prejudice arising from counsel's absence.

Instead, review of defendant Donald's ineffective assistance of counsel claim is governed by the test developed in *Strickland*, *supra*, which places the burden on defendant to establish that he was prejudiced by counsel's alleged deficient performance. Defendant Donald has not met that burden. Because defendant Donald was not linked to the series of telephone calls, and the telephone record evidence did not implicate defendant Donald in the charged crimes, there is no reasonable probability that the outcome of the trial would have been different had counsel been present during the initial portion of this testimony.

B. Defendant Donald's Standard 4 Brief.

Defendant Donald raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court

Administrative Order No. 2004-4, Standard 4, neither of which have merit.

Defendant Donald first argues that defense counsel was ineffective for failing to object to the prosecutor's conduct of vouching for the credibility of prosecution witness Siante Liggins. Because this issue was not raised in a motion for a new trial or request for a *Ginther*[2] hearing, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Contrary to what defendant Donald argues, it was not improper for the prosecutor to elicit the terms of Liggins's plea agreement, which required him to provide truthful testimony against defendant. The prosecutor did not suggest that either she or the government had some special knowledge, unknown to the jury, that Liggins was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Furthermore, the prosecutor properly could argue that the facts and evidence demonstrated that Liggins was worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, because the evidence showed that Liggins agreed to assist the police and there was evidence that the police made efforts to corroborate information they received from Liggins, the prosecutor properly could comment on that evidence in closing argument.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

*Bahoda, supra* at 282; *People v Ullah,* 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

Because there was no misconduct by the prosecutor, defense counsel was not ineffective for failing to object. Defense counsel is not required to make futile objections. *People v Darden,* 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant Donald next argues that he was improperly convicted of first-degree felony murder because there was insufficient evidence of premeditation and deliberation.

In reviewing a defendant's challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 368; 285 NW2d 284 (1979).

Contrary to what defendant Donald argues, premeditation and deliberation is not required to convict a defendant of felony murder. Rather, defendant Donald was charged with felony murder under an aiding and abetting theory. In *People v Riley (After Remand),* 468 Mich 135, 140-141; 659 NW2d 611 (2003), our Supreme Court explained:

> To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the

> intent to kill, or to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony.
>
> In order to satisfy the malice standard[,] ... the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. Further, if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with "wanton and willful disregard" sufficient to support a finding of malice.

In this case, there was evidence that defendant Donald and codefendant Moore, each armed with a gun, intended to rob Mohamed Mackie. Liggins testified that he saw both defendants enter the house. Michael McGinnis, who was one of the robbery victims, testified that at least two people came inside the house and took money from his pocket while holding a gun to his head. McGinnis heard two gunshots during the offense and later heard one of the intruders whisper that he had been shot. When the intruders left, McGinnis discovered that Mackie had also been shot. Liggins testified that both defendant Donald and codefendant Moore had

guns when they returned to his car. Defendant Donald was treated at a hospital for a gunshot wound later that night, and defendant Donald's blood was later discovered on the barrel of the weapon that was linked to the offense.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that, at a minimum, defendant Donald knowingly participated in the robbery and knowingly armed himself with a gun, which created a high risk of death or great bodily harm with knowledge that death or great bodily harm was a probable result of the intended crime. Thus, the evidence was sufficient to support defendant Donald's conviction of first-degree felony murder.

II. Docket No. 275691 (Defendant Moore)

Defendant Moore argues that he was denied a fair trial, and that the trial court erred by denying his motion for a mistrial, after McGinnis referred to a polygraph examination.

A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis,* 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights, that cannot be cured, and that impairs the defendant's ability to receive a fair trial. *People v Bauder,* 269 Mich App 174, 195; 712 NW2d 506 (2005).

On direct examination, the prosecutor asked McGinnis whether he ever saw his Razr cell phone

after it was taken from him during the robbery. He responded, "Yes. The police showed me after we went down to the police station they had me take a polygraph to make sure my story was correct because I did lie to them the first time." Following a defense objection, the trial court instructed the jury:

> Members of the jury, you know, that comment about the polygraph was not responsive to the prosecution. He mentioned it. Forget about that, and polygraph evidence usually as a rule is not allowed before the jury, so just forget about that comment, that testimony.

Later, McGinnis was asked on cross-examination whether he told something to Sergeant Meiers. He replied, "If Sergeant Meiers is the one who gave me the polygraph." Defense counsel immediately interrupted and redirected the question. There was no objection or request for a curative instruction to this later response. Defendant Moore later moved for a mistrial based on McGinnis's references to a polygraph, which the trial court denied.

The following factors should be considered when deciding whether a trial court abused its discretion in failing to grant a mistrial when a witness has mentioned a polygraph:

> (1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the

> results of the test were admitted rather than merely the fact that a test had been conducted. [*People v Yatooma*, 85 Mich App 236, 240; 271 NW2d 184 (1978).]

See also *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

Only McGinnis's first reference to a polygraph was met with an immediate objection and the trial court immediately gave a curative instruction. It is apparent, however, that both references were volunteered, and neither was injected in the context of attempting to bolster McGinnis's credibility. The first reference was offered as a frame of reference—to refer to the occasion when the police showed McGinnis his Razr phone, and the second reference occurred in the context of attempting to clarify the identity of a particular police officer. In neither instance were the results of any test revealed. Furthermore, McGinnis's credibility was not particularly crucial to a determination of defendant Moore's guilt or innocence. Although McGinnis was a robbery victim, he was not an eyewitness to the shooting of Mackie and he was not able to identify the perpetrators. Defendant Moore's identity as a perpetrator in the offense was instead established by independent evidence. Under the circumstances, the trial court did not abuse its discretion in denying defendant Moore's motion for a mistrial.

We also reject defendant Moore's claim that the trial court's cautionary instruction was inadequate and misleading. Because defendant Moore did not object to the court's instruction, his claim of instructional error is unpreserved and we review this

issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Contrary to what defendant Moore argues, the trial court's instruction did not leave the jury with the impression that McGinnis had passed a polygraph. As previously indicated, the results of any polygraph examination were never revealed and there was nothing about the court's instruction that suggested any results. Further, the trial court's instruction was not calculated to leave the jury with the impression that it could still consider any polygraph evidence. On the contrary, the court directed the jury to "[f]orget about that, so just forget about that comment, that testimony." Although defendant Moore argues that the trial court should have additionally explained to the jury that polygraph tests are unreliable, the need for such an explanation was curtailed by the fact that the results of any test were never disclosed, and by the court's instruction to forget about the comment altogether. The jury is presumed to have followed the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, defendant Moore has not established a plain instructional error.

Defendant Moore also argues that the trial court improperly prevented defense counsel from impeaching McGinnis with a 2003 conviction for breaking and entering and with his denial of a criminal record at the preliminary examination. A trial court's determination whether a prior conviction may be used for impeachment is reviewed for an

abuse of discretion. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005).

MRE 609 provides:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

"Theft crimes are minimally probative on the issue of credibility, and, therefore, they are admissible only if the probative value of the evidence outweighs the prejudicial effect." *Meshell, supra* at 635. When exercising its discretion, the trial court

"must articulate, on the record, the analysis of each factor." MRE 609(b).

Although the trial court did not analyze each of the applicable factors on the record, reversal is not required on this basis if the court was aware of the pertinent factors and of its discretion. *Meshell, supra* at 638. Here, the trial court specifically referred to MRE 609 and its discretion under that rule. It determined that the prior conviction did not have significant probative value of the issue of McGinnis's credibility, considering that McGinnis had already admitted previously lying to the police, and that the jury was already aware that McGinnis had a prior criminal record and history of involvement with drugs. Under the circumstances, the trial court did not abuse its discretion.

Furthermore, even if the trial court did err by precluding the additional impeachment evidence, the error was harmless. A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant Moore's defense theory, that the robbery and shooting were committed by defendant Donald and Liggins, did not hinge on McGinnis's credibility. Rather, McGinnis was unable to identify the perpetrators. Instead, Liggins testified at trial that he was present when defendant Moore and Fawzi Zaya discussed committing the robbery earlier in the day, that he drove defendants Moore and Donald to Mackie's house, and that defendants Moore and Donald both went inside the house while he waited in the car.

After the offense, the police spotted Liggins's vehicle and pursued it until it stopped at the end of a dead-end street. Defendant Moore, a passenger in the vehicle, was arrested. The police found evidence linked to the robbery inside Liggins's vehicle, and also found keys to a vehicle in Mackie's driveway and keys to Mackie's house in defendant Moore's possession. Under the circumstances, the case did not hinge on McGinnis's credibility, and it is not more probable than not that any error in excluding the additional impeachment evidence of McGinnis was outcome determinative.

Finally, defendant Moore argues that the trial court's critical comments of defense counsel pierced the veil of judicial impartiality, depriving him of a fair trial. Because defendant Moore did not object to the trial court's comments, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

The trial court has a duty to control the proceedings at trial, and to "exercise reasonable control over the mode and order of interrogating witnesses" for a variety of reasons, including avoidance of "needless waste of time" and the protection of witnesses from harassment. MRE 611; MCL 768.29. However, the court must exercise caution and restraint to ensure that its comments are not prejudicial or partial. *People v Conyers,* 194 Mich App 395, 405; 487 NW2d 787 (1992). "The test is whether the 'judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, and whether partiality "quite possibly could have

influenced the jury to the detriment of the defendant's case." ' " *Id.*, quoting *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986), quoting *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976).

Defendant Moore complains about a single instance in which a witness expressed confusion by one of defense counsel's questions and the trial court directed counsel to make his questions more specific. Although the trial court's comments may reflect some impatience with defense counsel, they did not pierce the veil of judicial impartiality. Further, considering the limited and isolated nature of the court's remarks, any perceived prejudice was alleviated by the trial court's later instructions to the jury that its comments, rulings, questions, and instructions were not evidence, and were not intended to influence the jury or express the judge's personal opinion.

Finally, having rejected defendant Moore's individual claims of error, reversal under a cumulative error theory is not warranted. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case Nos. 05-12835,
06-3169 & 06-3170

vs.

RASHAD MOORE, DEWAYNE SAINE
and CORY DONALD,

Defendants.
_____/

JURY TRIAL – VOLUME 4
BEFORE THE HONORABLE
THOMAS E. JACKSON – CIRCUIT JUDGE
DETROIT, MICHIGAN –
THURSDAY, SEPTEMBER 21, 2006

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* * *

[Page 63]

courtroom at about 10:50 a.m.)

DEPUTY SHERIFF: You may be seated.

THE COURT: Please be seated.

If I understand from side bar, the prosecution, you can explain this, you have sort of a schematic here, a document that worked out indicating the phone numbers that have been talked about here for the various persons known in the record and when calls were made and the number of calls and the

times they were made. Does that kind of explain what it is that you have?

MS. SIRINGAS: Yes, sir.

THE COURT: You can go ahead and add to that if you wish.

MS. SIRINGAS: Yes, your Honor. This was something that was created by Sergeant Marcetti by taking all of the phone numbers that he had and the numbers that he had matches with and created and that was in fact a rough copy of what was actually admitted at the preliminarily examination of Mr. Saine and Mr. Cory Donald. We had it basically, and I'll show it. It was marked as People's Exhibit No. 2, which is basically the same information contained on this

[Page 64]

exhibit, so when counsel says they're not on notice, I mean, all the phone numbers are information that they have, and I'm certainly entitled to show to the jury by way of a document that was created by this witness to explain how the phone numbers fit together. There's nothing objectionable.

THE COURT: Let me hear what the objection is starting with you, Mr. Cripps.

MR. CRIPPS: Yes, your Honor. That was their exam, not mine. It has never been introduced in any proceeding that I've been involved in in this case, number one. Number two --

THE COURT: But you were aware as part of the discovery here.

MR. CRIPPS: No.

THE COURT: That information has been given about calls being made, numbers being assigned and calls being made at certain times and connecting to other phone numbers, am I right about that?

MR. CRIPPS: You're right about that, but that document there I've never been provided and now it's going to be shown to the jury on the

[Page 65]

big screen, Judge.

THE COURT: Let me get the objections from the other lawyers here, Mr. Cunningham.

MR. CRIPPS: Judge, I want to finish my objection when you give me a chance.

THE COURT: Go ahead, please.

MR. CRIPPS: All right. I've never received that in discovery. It was used earlier in this trial to refresh somebody's memory and I objected to that and she said, well, this is my work product, and I never got a copy of it.

THE COURT: I'm trying to understand what is the problem with this. Say, for instance, right now in this courtroom while he was testifying he would have had a drawing on a board and he would have

said, well, this is the number for Fawzi so and so. This is the number for Mr. Saine and Mr. Moore, and these are the times that calls were made from these numbers, that would have put that right there in terms of demonstrating what is already known. What's the difference between this and them doing that?

MR. CRIPPS: The difference is this was withheld to me until now. It's been shown to the jury. I don't know what its accuracy is or what

[Page 66]

it shows or anything. That's the difference.

THE COURT: Any other objections?

MR. TUDDLES: My objection is I don't have a copy of it. I would appreciate it if -- this is the second witness she's shown this document to and now she's going to show it to the jury. I believe she's going to offer it into evidence. It's not in my discovery. I would just like the courtesy of having a copy of it, your Honor.

THE COURT: That's somewhat disingenuous that you make this kind of an argument. You all have discovery as to numbers being attributed to certain people here and numbers being called at a certain time from certain numbers to certain numbers, you know, based on the discovery and the investigation in this case. To just simply make a demonstrative, you know, exhibit or whatever it is, you know, that's being already known and what's being talked about, it would be no different, you

know, then if he were, as I said, to be able to have a chalkboard here or whatever it might be and be able to make a schematic of that in the courtroom or why it's being done. What's the difference

[Page 67]

between that and this? This doesn't hurt you or create any problems in any kind of way.

MR. TUDDLES: I would like to have the opportunity to sit at this table and prepare a cross-examination, and not based on how long she puts it on the board.

THE COURT: Fine, okay.

Do you have anything, Mr. Cunningham.

MR. CUNNINGHAM: No, your Honor. I don't have a dog in this race. It doesn't affect me at all.

THE COURT: Just want to get the record straight on this. This is not more than a demonstrative piece. You already know, as you already said, that you had information that you had these phone numbers. They associated with certain persons. They got the search warrants, you know, to get the information as to when calls were made, from what number it was made. That's already in the record. To simply put this, you know, say if the prosecutor was making her final argument here with that evidence and she said, well, this is a chart here showing what so and so did at certain times as demonstrative evidence, that's all that this is. I don't understand why

[Page 68]

we're making such a big issue out of this. We're going to move on with this as is and she's going to be able to show it. The objections are noted. If she wants to give you a copy, fine. I'm not going to require it.

Give us about five minutes and we'll start back up.

Get them back in a few minutes.

(Break taken at about 10:55 a.m.)

(Back on the record at about 10:18 a.m.)

DEPUTY SHERIFF: All rise.

(Jury No. 1 and Jury No. 2 enter courtroom at about 11:20 a.m.)

DEPUTY SHERIFF: You may be seated.

THE COURT: Member of the jury, sorry it took a little bit longer to get you back in. You probably think I don't know how to tell time, but it seems like every time we break that something else comes up on another case or another matter to be taken care of, so I usually have several matters, you know, assigned. We get these little printouts of what we have assigned every day and you can see by my list here other than this case there was about ten or twelve

[Page 69]

other matters to be taken care of along the way, so when you are having your breaks sometimes me and my staff, at least my court reporter, we're busy here taking care of other matters.

Mr. Cunningham stepped away. We'll wait for him. I didn't realize he was not there, so he should be here momentarily.

Are we going on with the chart next that we just did beforehand?

MS. SIRINGAS: Yes, sir.

THE COURT: I think that since we already know Mr. Cunningham, it doesn't apply to his client, we'll go ahead and proceed with that and I'll just let him know that that's what we're doing, okay, all right. So if we just talking about that particular matter we have before we had the break, let's go ahead and get it done.

(Mr. Cunningham not present.)

(People's Proposed Exhibit No. 45 was marked for identification at about 11:25 a.m.)

BY MS. SIRINGAS:

Q. Sir, before the break I had marked as People's Proposed Exhibit No. 45 a document that was created, and, your Honor, I do move the admission

[Page 70]

of No. 45 at this point.

THE COURT: Okay. Objections were noted. That's admitted.

(People's Proposed Exhibit No. 45 admitted into evidence at about 11:25 a.m.)

BY MS. SIRINGAS:

Q. Sergeant Marcetti, now, you had, you've testified, sir, you had in your custody the cell phone of Rashad Moore, correct?

A. Correct.

Q. You looked at that cell phone and obtained certain numbers from that cell phone?

A. Yes, I did.

Q. And then you pulled out relevant phone calls that were made; is that correct?

A. Correct.

Q. And you noted relating to those phone calls the time that the phone calls were made, correct?

A. Yes.

Q. And which phone called which other phone, correct?

A. Yes, I did.

Q. So on Exhibit 45, sir, describe the exhibit to the jury.

[Page 71]

A. This is a compilation of the different phone numbers, records, and the nexus or connection between them. On the 14th, and it's linking Rashad Moore, Derrick Saine, and Fawzi Zaya's phone. At the top middle we see Fawzi Zaya in the square 220-3126. To the lower left you'll see Rashad Moore's phone number, the phone that he had, 205-0397, and the phone number for Derrick Saine's phorie, 683-5481. If you start off just, since we're here we'll start off on the left, 205-0397. Moore's phone places two calls to Fawzi Zaya at 1:54 p.m. and 3:19 p.m., Derrick Saine.

MR. CRIPPS: Judge, can I ask for a question and answer?

THE COURT: Get to a question and answer, please.

MS. SIRINGAS: That's fine, your Honor.

BY MS. SIRINGAS:

Q. Sir, does this document, No. 45, show whether there were any phone calls made from Rashad Moore's cell phone, 205-0397, to Fawzi Zaya's cell phone of 220-3136?

A. It does.

Q. And what does that show, sir?

[Page 72]

A. Two calls at 1:54 p.m. and 3:19 p.m.

Q. Just to be clear, these are, okay, the top of that document, sir, actually says, looking at it now, it says 01-14-05?

A. Correct.

Q. Is that correct?

A. No. It should be 11-14.

Q. So this is on November 14?

A. Correct.

Q. 2005?

A. Yes.

Q. Okay. So this is the day of the homicide?

A. Yes, it is.

Q. And the records that have been admitted here, is that where you obtained the information that you created this chart with, sir?

A. Yes. After sending out the search warrants what was sent back to me from the respective phone companies listing the incoming and outgoing calls.

Q. And you also had physical possession of Rashad Moore's cell phone, correct?

A. Yes.

Q. And it shows two calls to who?

A. To the 220-3136, which was later established to

[Page 73]

be Fawzi Zaya's phone.

Q. And that is from Mr. Moore's cell phone, there is an arrow pointing to Mr. Zaya from Mr. Moore's cell phone?

A. Correct.

Q. And does that mean that the call initiated was initiated by Mr. Moore, sir?

A. Yes.

Q. To Fawzi Zaya?

A. Correct.

Q. And at what times?

A. 1:54 p.m. and 3:19 p.m.

Q. Now, were there any phone calls made to Fawzi Zaya by what you have listed as Derrick Saine's phone number?

A. Yes. There were two.

Q. And that number that you've assigned to Derrick Saine is 683-5481, correct?

A. Yes, correct.

Q. And the arrow is in -- which direction is the arrow pointing?

A. Starting from Derrick Saine's phone number to Fawzi Zaya.

Q. And how many calls were made off of Derrick Saine's phone to Fawzi Zaya's phone?

[Page 74]

A. Two.

Q. And what times were those phone calls made, sir?

A. 3:23 p.m. and 9:17 p.m.

Q. And the homicide in this case was sometime, based on the information at least, the response was around 8:30 in the evening, correct?

A. Yes, it is correct.

Q. And you have phone calls, do you have any phone calls going from Derrick Saine's cell phone to Rashad Moore's cell phone?

A. Absolutely.

Q. And how many phone calls were made from the 683-5481 number to the 205-0397 number?

A. The records indicate that there were twenty calls from Derrick Saine's phone number to Rashad Moore on the date that Mr. Mackie was killed on the 14th.

Q. And you have those broken down by a.m. and p.m.; is that correct?

A. Yes.

Q. So there's how many phone calls in the morning?

A. I believe there was eight before and twelve after, twenty total.

Q. So in the morning the ones that say a.m. are basically 8:17, 8:19, 8:19, 8:28, 8:32, 8:32,

[Page 75]

8:32, those are all a.m.?

A. Yes.

Q. On the 14th of November?

A. Correct, yes.

Q. And then in the p.m. how many phone calls do you have from Mr. Saine to Mr. Moore?

A. I believe it's twelve. Twelve.

Q. And just for the record, what times were those phone calls placed from Derrick Saine's phone number to Rashad Moore's phone number?

A. The records indicate 7:06, 7:07, 7:38, 7:41, 8:33, 8:33, 8:33, 8:57, 9:09, 9:14, 9:18, and 9:18.

Q. Thank you, sir.

THE COURT: Cross-examination?

Leave it up there for cross-examination. You may do cross-examination.

MR. TUDDLES: Sure, your Honor.

THE COURT: I'm sorry, did you have more?

MS. SIRINGAS: I have some other areas.

THE COURT: Just deal with what's up on the screen.

MS. SIRINGAS: Just limit to --

CROSS-EXAMINATION

[Page 76]

BY MR. TUDDLES:

Q. Now, as with looking at this document here it appears as to though if you attach the 683-5481 number to or being Mr. Saine's telephone, Mr. Saine apparently called Mr. Zaya at 7:30 or 7:23 p.m., is that accurate?

A. That's what the records indicate, yes.

Q. Okay. He would call him and you would agree that he probably called him because he wasn't physically with him, would you agree with that?

A. I don't know where he was.

Q. Okay. And then you see another call approximately two hours later at 7:00, at 9:17 p.m., is that accurate?

A. That's what the records indicate, yes.

Q. Would you say it's safe to say that they weren't together at that time?

A. I have no idea where they were, Counsel.

Q. Now, is it anything incriminating, you said between Mr. Saine, Mr. Saine apparently called the telephone number associated with Mr. Moore approximately twenty times that day; is that accurate?

A. Twenty times, yes, sir.

Q. Do you have the telephone records for the day

[Page 77]

prior?

A. No.

Q. So you don't know whether or not that's unusual for Mr. Saine to call Mr. Moore approximately twenty times a day?

A. Correct. The records were only for the 14th.

Q. I understand that. So you don't know if this is unusual or not, do you?

A. I don't know.

Q. And there is nothing according to your records or according to the information you got from Mr. Liggins or anyone else, there was nothing criminal afoot in the a.m. that day, was there?

MS. SIRINGAS: Your Honor, I object.

THE COURT: Well --

MR. TUDDLES: It's cross-examination.

THE COURT: That kind of question, whether or not anything was criminally afoot, how can you expect him --

MR. TUDDLES: I'll rephrase the question.

THE COURT: Thank you.

BY MR. TUDDLES:

Q. You have no information saying that any planning or any criminal activity was going on

[Page 78]

approximately eight o'clock in the morning, do you?

MS. SIRINGAS: That calls for speculation. How does he know --

THE COURT: Hold on a minute, please. He's asking if he has any information about anything occurring at that time.

THE WITNESS: Eight o'clock in the morning, no.

THE COURT: Move on, please.

BY MR. TUDDLES:

Q. Now, do you see that there's a break apparently at 8:32 in the morning that Mr. Saine does not contact or call Mr. Moore's telephone number again until seven o'clock?

A. That's what it shows, yes, sir.

Q. So no contact between those two gentlemen between that time?

A. The records, the phone indicate that there is no contact.

Q. We're only talking about the telephone.

A. Okay.

Q. Now, you also see that according to your contact numbers, at 7:06, 7:07 Mr. Saine called Mr. Moore, do you see that?

[Page 79]

A. 7:07, yes.

Q. 7:06 and 7:07?

A. Yes.

Q. Would you agree that he called him probably because he was not in his presence at that time?

A. Counsel, I have no idea why he called him.

Q. Not why he called him. Would you agree that they're not together?

A. No. I don't know if they were together or they weren't together.

Q. At 7:38 Mr. Saine apparently called the telephone number associated with Mr. Moore, correct?

A. 7:38?

Q. Do you see 7:38 and you see 7:41?

A. Yes.

Q. And you would agree that 7:23 is in between 7:07 and 7:38?

A. Oh, I would agree to that, yes, sir.

Q. And if normally you don't call people that you're sitting right next to, do you, you personally?

MS. SIRINGAS: Objection as to relevance.

MR. TUDDLES: It's very relevant.

THE COURT: I think that it's an inference or what you want to call it that can be

[Page 80]

made in your argument to the jury as to whether or not they may or may not have been together. He can't --

MR. TUDDLES: I'm just asking him does he generally call people that he's sitting next to.

THE COURT: You can answer that, sir.

BY MR. TUDDLES:

Q. Do you generally call people that you're sitting in the car with?

A. In the same car with?

Q. Yes.

A. Generally as a rule, no.

Q. Okay. All right.

(Mr. Cunningham returns at about 11:35 a.m.)

BY MS. SIRINGAS:

Q. And you would agree too that there's another hour break before the 7:41 contact and the 8:33 contact?

A. Yes.

MR. TUDDLES: Thank you. No further questions.

Oh, one further question.

BY MR. TUDDLES:

[Page 81]

Q. Do you have a log of when either one of these telephone calls were answered?

A. When?

Q. Were they answered, do you know whether or not the 8:32, the call made at 8:32 in the morning, the third call made at 8:32 in the morning, whether or not that telephone call was answered?

A. No. The records don't indicate whether the phone was answered and anybody physically picked up the phone, but it would show a duration time of seconds.

Q. So you don't know whether it was answered?

A. No.

Q. Or if any conversation took place?

A. I don't.

Q. And if any conversation took place you don't have any information regarding a content of any conversation, do you?

A. That's correct.

MR. TUDDLES: No further questions.

I apologize, your Honor. I do have one.

THE COURT: Go ahead.

MR. TUDDLES: No. I'll withdraw at this point.

[Page 82]

THE COURT: Mr. Cripps, as to this matter right here, I'm going to allow both to finish cross-examination after Ms. Siringas finishes, but as to this chart here.

MR. CRIPPS: I have some general questions as far as the numbers and stuff. Do you want to me save that, Judge?

THE COURT: Do you have anything that's specifically related to this diagram right now to ask?

MR. CRIPPS: Not to the diagram.

THE COURT: All right then. We'll proceed then. Finish your examination. Go ahead, Ms. Siringas.

MS. SIRINGAS: Thank you, your Honor.

REDIRECT EXAMINATION

BY MS. SIRINGAS:

Q. Sir, before the discussion that we had regarding the telephones you had talked about coming in to contact with Mr. Liggins and then continuing your investigations --

THE COURT: Just for the record here, note Mr. Cunningham is now here, and up until that

point we only were discussing the telephone chart that was there, Mr. Cunningham.

[Page 83]

MR. CUNNINGHAM: Yes, your Honor, and as I had indicated on the record, I had no dog in the race and no interest in that.

THE COURT: I just wanted to have the record reflect that.

Okay. Move on.

BY MS. SIRINGAS:

Q. Sir, at some point did you develop any information about someone having been shot and having been taken to the hospital on the evening of the homicide?

A. Yes.

Q. What date, sir, if you remember, was it that you received information relating to possibly somebody having been shot --

A. I believe --

Q. -- at the homicide scene?

A. I believe it was the 2nd of December, roughly.

Q. And pursuant to that information, sir, did you obtain any medical records -- did you go to a certain hospital?

A. Yes.

Q. What hospital did you go to?

A. Sinai Grace Hospital.

Q. And did you obtain any medical records from Sinai